57-78

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1545. 1103

DAVID J. HENNESSY, APPELLANT,

vs.

GEORGE V. BACON AND EDWARD G. ROGERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED JANUARY 18, 1890.

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1 United States Circuit Court, District of Minnesota. In Equity.

Pleas before the honorable the judges of the United States circuit court of America for the district of Minnesota, at the June term of said court, held in the city of St. Paul, in said district, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the 113th year.

GEORGE V. BACON, Complainant,
vs.
DAVID J. HENNESSEY, Defendant.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 6th day of December, 1886, came the complainant above named, by Rogers & Hadley, his solicitors, and filed in the clerk's office of said court his return from the district court of Washington county; which said return is in the words and figures following:

Return from District Court of Washington County.

2 STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

I hereby certify and return that at the city of St. Paul, county and State aforesaid, on the 11th day of September, 1886, I served the summons and complaint hereto attached upon the within-named David J. Hennessey personally by handing to and leaving with David J. Hennessey a true and correct copy thereof.

FRED. RICHTER,
Sheriff of Ramsey County, Minn.

Dated this 11th day of September, 1886.

FRED. RICHTER,
Sheriff of Ramsey County, Minnesota,
By REUBEN CLEWETT, *Deputy.*

Sheriff's fee:

Service	$1 00
Travel	12
	$1 12

Summons.

STATE OF MINNESOTA:

District Court, 1st Judicial District, County of Washington.

GEORGE V. BACON
v.
DAVID J. HENNESSEY.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint

in this action, a copy of which is herewith served on you, and to serve a copy of your answer to said complaint on the subscribers, at their office, in the city of St. Paul, Ramsey county, Minnesota, within twenty days after the service of the summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded therein.

3

ROGERS & HADLEY,
Plaintiff's Attorneys, St. Paul, Minnesota.

STATE OF MINNESOTA, }
Washington County. }

District Court.

GEORGE V. BACON }
vs. }
DAVID J. HENNESSEY. }

The complaint of said plaintiff in this cause shows to the court and states--

That said plaintiff is the owner in fee simple of an undivided one-half of the property and premises hereinafter described.

That said defendant is the owner in fee simple of an undivided one-half of the property and premises hereinafter described.

That said premises are situated in the said county of Washington and more fully described as follows, to wit: The southeast quarter (S. E. $\frac{1}{4}$) and the east half (E. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) and the northeast quarter (N. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$), all in section thirty-one (31), of township twenty-nine (29) north, of range twenty-one (21) west, according to the United States Government survey thereof.

4

Plaintiff further says that to the best of his knowledge, information, and belief no other person save as herein stated has any right, title, or interest in or lien upon any part or portion of said premises.

Further complaining herein, said plaintiff avers and says, upon information and belief, that said property is of the cash value of forty thousand dollars.

Further complaining, plaintiff avers that he desires a partition of all and every portion of said property according to the respective rights and interests of the persons interested therein or a sale thereof, and a partition of the proceeds, should it appear to this court that an actual partition thereof cannot be had without prejudice to the owners thereof.

Wherefore plaintiff demands judgment of partition of said property under and pursuant to the practice of this court and the statutes in such case made and provided; also for such other and further order and decree herein as may be just and proper in the premises, with costs of suit.

ROGERS AND HADLEY,
Plaintiff's Attorneys, St. Paul, Minnesota.

STATE OF MINNESOTA, *County of Ramsey,* } ss:

George V. Bacon came before me personally, and, being duly sworn, doth say that he is plaintiff in the above-entitled action; that the foregoing pleading is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters that he believes it to be true.

GEORGE V. BACON.

Subscribed and sworn to before me this 11th day of September, A. D. 1886.

JOHN W. LANE,
Notary Public, Minn.

[NOTARIAL SEAL.]

Endorsed: Filed Oct. 19, 1886. C. A. Bennett, clerk.

STATE OF MINNESOTA, *County of Washington.* }

District Court, First Judicial District.

GEORGE V. BACON, Plaintiff,
vs.
DAVID J. HENNESSEY, Defendant.

Answer.

First.

Now comes defendant herein, and for answer denies each and every of the allegations in the complaint except as the same are hereinafter expressly admitted or qualified.

And defendant admits that he is the owner in fee simple of an undivided one-half of the property and premises described in the complaint; that the said premises are situated in the county of Washington, Minn.; that the description given thereof is correct, and that they are of the value of $40,000.

Defendant admits that plaintiff holds a title of record to an undivided one-half of said premises, but denies that he is the true or equitable owner of any part or portion thereof.

Defendant admits that no other person or persons save himself and plaintiff have any right, title, or interest in or lien upon any part or portion thereof.

Defendant admits that no other person or persons save himself and plaintiff have any right, title, or interest in or lien upon any part or portion of said premises, and denies that plaintiff has any interest therein save that above stated and hereinafter set forth; but defendant alleges that he himself is the real and equitable owner of that undivided one-half of said premises to which plaintiff holds the aforesaid record or apparent legal title, and that plaintiff holds said title only in trust for this defendant, and has himself no real or equitable right thereto or property or interest therein whatever.

And for the particular facts showing defendant's ownership of said last-mentioned undivided one-half of said premises
7 defendant refers to the second count of this answer.

Second.

And for further answer def't alleges that, to wit, on or about March 27th, 1882, plaintiff entered into an agreement with one George N. Chittenden, the then owner in fee of the premises described in the complaint, and it was agreed between said Chittenden and said Bacon that said Chittenden should sell and convey said premises to said Bacon for the sum of $4,400.00; that said contract was in writing, was duly witnessed and acknowledged and filed for record in the office of the register of deeds of Washington county, Minnesota, on the 29th day of March, 1882, and duly recorded in Book F of Bonds, on pages 501 and 502.

That afterwards and, to wit, on or about June 27th, 1882, and while the said contract was still in full force and unperformed, the plaintiff and his wife and this defendant entered into an agreement whereby, in consideration of the sum of five hundred dollars ($500), to be paid by said defendant to said plaintiff, and one hundred dollars of which was thereupon paid to said plaintiff, said plaintiff, together with his wife, sold and conveyed, transferred and assigned, to this defendant all his and their right, title, and interest in and to the said contract made as aforesaid between the said plaintiff and the said Chittenden, and specially agreed and covenanted with said defendant that said defendant should receive a good, clear, and perfect title to the aforesaid lands through good warranty deeds, with usual covenants running either from the said Chittenden and wife to the said defendant or from the said Bacon and wife to the said defendant.

8 That the said contract between plaintiff and wife and this def't was in writing and was duly witnessed and acknowledged & duly filed for record in the office of the register of deeds of Washington Co., Minn., on the 21st day of August, 1882, and duly recorded in the records of said office.

That the said defendant on, to wit, June 27th, 1882, duly tendered and *ordered* to pay to the said Chittenden the said sum of $4,400, in pursuance and fulfillment of the said contract assigned as aforesaid to said def't by said plaintiff and wife, and duly offered to fully perform each and every of the covenants and conditions to be performed by said plaintiff under said contract with said Chittenden, and demanded a warranty deed conveying to him a good title to said lands; that the said Chittenden did not at the time have or offer such deed, but that he then and there promised to subsequently execute and deliver such, and that he failed and neglected to do so.

That the said sum of $4,400 tendered as aforesaid was in legal tender or United States notes.

That def't has always been ready and willing to make the payments and perform the covenants required by him by the said contracts and each of them, and has repeatedly so notified and informed

the said plaintiff and the said Chittenden, and has offered full performance on his part of all his obligations under said contracts.

That defendant has also repeatedly demanded of said Bacon & said Chittenden the fulfillment on their part of their respective covenants and stipulations under the said contracts and the conveyance to him of the said lands as agreed, but that they have always failed and neglected to make such fulfillment and conveyance.

That said lands, soon after defendant's purchase thereof, began to increase rapidly and very notably in value, and that forthwith plaintiff manifested an unwillingness that defendant should be invested with a good title therein, and sought by various arts and pretenses to delay the transfer of such title to said lands to defendant and sought how he might evade the obligations of his said contract with defendant.

That finally, after the facts and transactions above set forth and after he had secured the evidence and documents necessary to free the title to said lands from certain clouds and defects that existed upon it, but which he declined to remove from the record, the plaintiff, as defendant alleges upon information and belief, procured and obtained the title to the said lands in the name of one Edward G. Rogers with a view to defraud defendant and in pursuance of an understanding and agreement between said Rogers and said plaintiff that said title should be held in the name of said Rogers in secret trust for said Bacon, and that said Rogers should pretend to defendant and claim that he owned the same, and that said Bacon had no interest therein, and that he should refuse to convey the title to def't and should threaten to sue him, whereby defendant would be deceived and induced or compelled to relinquish his rights to said lands under said contracts, and that if successful in carrying out said scheme and perfecting said fraud upon defendant said Rogers should receive as compensation for his services and his part in said fraudulent transaction a portion in kind of the proceeds and profits to be obtained thereby.

That in pursuance of said understanding and agreement between the said Bacon and the said Rogers the said Rogers took the title to the said lands and represented to the defendant that said Bacon had no interest therein or in any part thereof, and that he himself was the sole owner in fee of said lands, and that the contracts aforesaid merely constituted a cloud on his title to said lands, and that unless said defendant removed said cloud he would bring suit against him for the removal thereof and would secure judgment against him for costs of said suit.

That also in pursuance of said understanding and agreement between said Bacon and said Rogers and in furtherance of said scheme and fraudulent purpose the said Bacon made similar statements to def't as were made by said Rogers; that the said defendant was misled and deceived by said representations and statements and was ignorant of the understanding and agreement between said Bacon & said Rogers, and that the said Bacon had any interest in the title held as aforesaid by the said Rogers to the said lands, and that

def't was thereby and as a consequence thereof induced to enter into an agreemen with the said Rogers which he otherwise would not have done, whereby he, defendant, paid to said Rogers $2,750 in money and gave him a quitclaim deed to an undivided one-half of said lands in consideration of a quitclaim deed
11 which the said Rogers made to him, def't, for the other undivided one-half of said lands.

And def't alleges that the said Rogers had at all times full notice of the aforesaid contracts and of defendant's rights thereunder, and that said Chittenden in conveying said lands to said Rogers was acting fraudulently and in bad faith.

Defendant further alleges that the aforesaid title of record held by plaintiff in this cause and which in his complaint he claims to own is the title of the said undivided one-half of said lands conveyed as aforesaid by said def't to said Rogers, and that pl'ff derived said title by conveyance immediately to him from said Rogers, and which was made in pursuance of the aforesaid fraudulent understanding and agreement between himself and the said Rogers.

Def't further alleges, upon information and belief, that at the time of said fraudulent understanding and agreement between the said Bacon and the said Rogers the said Bacon and the said Rogers were and had been partners and sharers in several real-estate speculations, and that said Rogers was the confidential friend and counsel of said Bacon and was fully acquainted with all the facts above set forth or hereinafter stated and with the intentions of said Bacon to deceive def't and defraud him out of the said lands and aided in carrying said intentions into effect, and that — all times during said fraudulent transaction said Rogers was holding said title and acting in regard thereto as the secret agent and trustee, confidential
12 friend and counsellor of said plaintiff and not for himself.

That said facts as to said fraud were unknown to def't until after the commencement of this suit.

Def't further alleges that the said one hundred dollars paid as aforesaid by him to pl'ff are still held by pl'ff and have never been tendered back, and that defendant has always been and still is ready and willing to pay the remaining $400.00 which were to be paid by said def't to said pl'ff upon receiving title to said lands as aforesaid and to pay the balance of the purchase-money due on said contract between said Chittenden and said pl'ff and all other sums and amounts that defendant ought rightfully to pay, and he hereby offers to pay all said sum or sums, amount or amounts, and to do and perform all equities.

Wherefore the defendant prays that the complaint be dismissed, and that said deed from def't to said Rogers be set aside and declared void, and that an account be taken of the amount which def't in equity ought to pay on the said lands, and he be permitted to pay the same, and that plaintiff be required to convey the said premises claimed by him in the complaint to def't, and that def't be declared owner thereof, and that def't have such other and further relief as may be equitable, with costs.

H. C. McCARTEY,
Defendant's Att'y, St. Paul, Minn.

13 STATE OF MINNESOTA, } ss:
County of Ramsey, }

H. C. McCatey, being duly sworn, deposes and says that he is the defendant's attorney in the above-entitled action; that the foregoing answer is true according to the best knowledge, information, and belief of affiant, and that the said defendant is absent from the county of Ramsey, wherein resides affiant.

H. C. McCARTEY.

Subscribed and sworn to before me this 1st day of October, 1886.

OTTO K. SAUER,
[NOTARIAL SEAL.] *Notary Public, Minn.*

Endorsed: Due and legal service of the within answer is hereby admitted this 1st day of October, 1886. Rogers and Hadley, pl'ff's att'ys. Filed Oct. 1st, 1886, at 5.45 p. m. C. A. Bennett, clerk.

14 STATE OF MINNESOTA, }
Washington County. }

District Court.

GEORGE V. BACON }
against }
DAVID J. HENNESSEY. }

The reply of said plaintiff to the answer of said defendant in this cause shows to this court and states:

I.

That said plaintiff denies each and every statement, averment, matter, and thing and every part and portion thereof in said answer contained as therein stated or otherwise, except as hereinafter stated, admitted, or qualified and except as stated in his complaint in this cause.

II.

Further replying herein, said plaintiff avers and says that he admits that on the 27th day of March, 1882, he entered into a certain contract with one George N. Chittenden, who claimed then and there to be the owner of the land and premises mentioned in the complaint in this cause, for the purchase thereof from the said Chittenden for the sum of $4,400.00, on the terms and conditions stated in said contract, and which contract is recorded in the office of the register of deeds of Washington county, as stated in said answer, and a true and correct copy of which said contract is hereto attached, marked "A," and made a part hereof.

15 That afterwards and on or about the 29th day of June, 1882, this plaintiff and defendant made and entered into a certain contract in reference to said lands, a true and correct copy of which is hereto attached and marked "B" and made a part hereof, and being the same contract referred to in the answer of the

defendant herein, and which said contract was recorded in the office of the register of deeds of said Washington county on the 21st day of August, 1882, in Book "F" of Bonds, on page 600, and that defendant then and there paid this plaintiff on said contract the sum of one hundred dollars.

III.

Further replying, plaintiff avers and says that he especially and specifically denies that said defendant, on the 27th day of June, 1882, or at any other time or place, ever tendered or offered to pay to said George N. Chittenden or to any one for him or to this plaintiff or any one for him the sum of $4,400.00 or any other sum of money in pursuance or fulfillment of the said contract marked Exhibit "A," as assigned by plaintiff and wife to defendant in Exhibit "B," in any way or manner, either as stated in said answer or otherwise.

Plaintiff further says that he especially and specifically denies that said defendant was ever ready or willing to perform the covenants and conditions of said contracts on his part to be done and performed either with said Chittenden or this plaintiff in any way or manner, but has always neglected and refused so to do, although he has frequently and persistently been opportuned so to do both by said Chittenden and this plaintiff.

16 That said Chittenden and this plaintiff were always willing and anxious to perform said contract on their part and repeatedly offered so to do, but that said defendant wholly refused and neglected to perform the terms and conditions of said contract on his part in whole and in part, and utterly neglected and refused to take said property or pay for the same in any way or manner.

IV.

Further replying herein, said plaintiff avers and says that on the 30th day of September, 1885, one Edward G. Rogers, mentioned in the answer in this cause, purchased of one John B. Sanborn and wife all of the right, title, and interest of said Sanborn and wife in and to the property and premises described in the pleadings in this cause, and said Sanborn conveyed and transferred to said Rogers all of his interest in said premises and transferred and conveyed to said Rogers all liens on said land by way of mortgage or otherwise owned by him, said Sanborn, and in consideration whereof said said Rogers then and there paid said Sanborn the sum of one thousand dollars in cash, all of which more fully appears from the records in the office of the register of deeds of said Washington county; and said Edward G. Rogers did also thereafter purchase from the said George N. Chittenden and wife the said prop-

17 erty and premises, paying, the said Chittenden the sum and amount of four thousand seven hundred five and $\frac{87}{100}$ dollars therefor, and said George N. Chittenden and wife executed and delivered to said Rogers a full covenant warranty deed therefor, which deed was filed for record in the office of the register of deeds of said

Washington county on the 4th day of November, 1885, in Book 15 of Deeds, on page 445, and to which reference is hereby made for greater certainty; that thereby the said Edward G. Rogers became and was then and there the sole owner of said property and all of the same, subject to whatever rights said defendant had acquired or held under and by virtue of the contracts, Exhibits "A" and "B," as aforesaid. Plaintiff further says that in all of said transactions in the purchase from said Sanborn and in the purchase from said Chittenden said Rogers acted for himself and in his own behalf and not for or in behalf or on account of this plaintiff in any way or manner, either as stated in said answer or otherwise, and said plaintiff denies all and all manner of fraudulent combination between this plaintiff and this Rogers to cheat and defraud said defendant in any way or manner, either as stated in said answer or otherwise, and denies that said Rogers bought said property or any part thereof in trust for this plaintiff or for this plaintiff in any way or manner whatever, and denies that said Rogers took the title to said property or any part thereof in his name in trust for this plaintiff or for this plaintiff in any way or manner whatever, and denies that said Rogers took the title to said property or any part thereof in his name in trust for or for the benefit and advantage of this plaintiff in any way or manner, either as stated in said answer or
18 otherwise; and plaintiff denies that said defendant was misled or deceived by any act or acts, statement or statements, of this plaintiff or of said Rogers, either as stated in said answer or otherwise, and said plaintiff denies that he made statement to defendant regarding the title and ownership of said property, as alleged in folio 15 of defendant's answer, or any statement whatever, and plaintiff denies, upon information and belief, that said Rogers ever made the statement to defendant alleged in folios 14 and 15 in said answer or any statements whatever regarding the title of said property and the ownership thereof except to say that he, said Rogers, was the owner thereof.

V.

Further replying herein, said plaintiff avers and says that said Rogers so being the owner of said property as aforesaid and said Hennessy so claiming an interest therein under said contracts, Exhibits "A" & "B," as aforesaid, on the 18th day of March, 1886, they made and entered into a certain contract in writing, wherein and whereby, to finally settle the title to said land and all matters in dispute between said Rogers and said defendant and said defendant and this plaintiff in relation thereto, said Rogers, in consideration of the sum of $2,750 in cash to be paid him by said defendant and an assignment to him by said defendant of the sum of one hundred dollars, which said defendant claimed this plaintiff owed him on account of the payment of one hundred dollars from this defendant to plaintiff, and being the same one hundred dollars mentioned in folio 21 of the answer, as stated in Exhibit "B," said Rogers agreed to put all papers relating to the title

of said land in his possession unrecorded on record and
19 execute and deliver to said defendant a deed of an undivided one-half interest in all of said premises and property; and said defendant, in further consideration thereof, was to and did then and there agree to settle and did then and there and thereby settle, forego, compromise, and compound all claims and demands of every kind and nature which he had or claimed to have against this plaintiff or said George N. Chittenden arising or growing out of any transaction relating to the property and real estate in dispute, and said defendant was also by the terms of said settlement to make, execute, and deliver to said Rogers a deed to an undivided one-half of said premises; that afterward, in pursuance of said agreement, said Rogers recorded all papers as provided in said agreement and delivered to said defendant the deed as aforesaid, and did all the acts and things on his part to be done and performed under and in accordance with said agreement, and said Hennessy executed and delivered to said Rogers a deed as provided in said agreement and paid said Rogers the sum of $2,750 in cash and assigned said account of $100 to said Rogers, and the whole matter and all matters in dispute in relation to said land were wholly and entirely and finally settled.

Plaintiff further says that said defendant derived and obtained his title to an undivided one-half interest in said premises by virtue of the foregoing compromise and settlement, and not otherwise.

Plaintiff further says that after said settlement as aforesaid said Rogers deeded to this plaintiff, for a good and valuable consideration, an undivided one-fourth interest in said premises, and
20 that while so the owner of one-fourth of said premises, and said Rogers the owner of one-fourth of said premises, the said Hennessy the owner of an undivided one-half of said premises as aforesaid, and on or about the 19th day of April, 1886, said defendant, said Rogers, and this plaintiff joined in an action as plaintiffs against one A. A. Torbet, in the district court of Ramsey county, Minnesota, to have declared and decreed by said court as satisfied and paid a certain mortgage which appears as a lien on said premises; that said suit was instituted and carried to judgment with the full knowledge and consent of said defendant and at his request; that the files and records of said court are hereby referred to for greater certainty.

Plaintiff further says that on the 31st day of August, 1886, he purchased of said Rogers an undivided one-fourth interest in said lands for the sum and amount of about ten thousand dollars then and there paid said Rogers by this plaintiff; that said plaintiff thereby and by reason of said purchase as aforesaid became the owner of an undivided one-half of the property and premises mentioned in the complaint in this cause, and not otherwise, either as stated in said answer or otherwise. Wherefore plaintiff prays for the relief that he in his complaint has prayed.

ROGERS & HADLEY,
Pl'ff's Attorneys, St. Paul, Minn.

21 EXHIBIT "A."

This agreement, made and entered into at St. Paul, Minnesota, this twenty-seventh day of March, 1882, by and between George N. Chittenden, of Plainfield, Will county, State of Illinois, and George V. Bacon, of the town of Woodbury, Washington county, State of Minnesota, witnesseth:

That the said George N. Chittenden has sold and doth agree to convey in fee simple unto the said George V. Bacon, his heirs and assigns forever, by a good and sufficient deed of warranty, on or before the twenty-seventh (27) day of June, 1882, upon the punctual payment by said George V. Bacon of the consideration money hereinafter mentioned, the following lands, situated in the town of Oakdale, Washington county, State of Minnesota, to wit: Southeast one-quarter (S. E. ¼) and east one-half of southwest quarter (E. ½ of S. W. ¼) and the northeast one-quarter of the northwest quarter (N. E. ¼ of N. W. ¼), all in section thirty-one (31), town. twenty-nine (29), range twenty-one (21), together with all the rents, profits, appurtenances to the same belonging; and the said George V. Bacon does covenant and agree to and with George N. Chittenden, his heirs and assigns, that he will pay to the said George N. Chittenden, his heirs and assigns, the sum of four thousand four hundred dollars, the consideration money of said premises, at such a time as the said George N. Chittenden shall execute a sufficient deed of general warranty. It is understood and agreed by and between the parties to this agreement that if the said George V. Bacon fails to pay the said consideration money, then this agreement is void—time being of the essence of this agreement.

22 In testimony whereof the said George N. Chittenden and George V. Bacon have hereunto set their hands and seals the day and year first above mentioned.

GEORGE N. CHITTENDEN. [SEAL.]
GEORGE V. BACON. [SEAL.]

Signed & sealed in presence of us—
E. S. CHITTENDEN.
W. S. FINDERLAKE.

The words "time being of the essence of this agreement" inserted in the lines 5 & 6, above inserted, before execution and delivery thereof.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known that on this 27th day of March, A. D. 1882, before me personally came George N. Chittenden and George V. Bacon, to me known to be the persons described in and who executed the foregoing contract, and they severally acknowledged that they executed the same freely and voluntarily.

[NOTARIAL SEAL.] EDWIN S. CHITTENDEN,
Notary Public, Ramsey County, Minnesota.

EXHIBIT "B."

Received, Saint Paul, Minnesota, this 27th day of June, eighteen hundred and eighty-two, of David J. Hennessy, of Dubuque, Iowa, one hundred dollars, in part payment of five hundred dollars, in consideration of which we, George V. Bacon and Charrie A. Bacon, his wife, do hereby assign, transfer, and convey all my right, title, and interest in and to a certain agreement and bargain of sale, bearing date the twenty-seventh day of March, eighteen hundred and eighty-two, and made and entered into by and between George N. Chittenden, of Plainfield, Will county, State of Illinois, and George V. Bacon, of Washington county, Minnesota, for the
23 sale and transfer from the said Chittenden to the said Bacon of the following lands, situate in the county of Washington, State of Minnesota, to wit: Southeast one-quarter (S. E. ¼) and east half of southwest quarter (E. ½ of S. W. ¼) and northeast quarter of the northwest quarter (N. E. ¼ of the N. W. ¼) of section thirty-one (31), town. twenty-nine (29), and range twenty-one (21 W.) west, of principal meridian. The said agreement and bargain of sale is the same that was filed in the office of the register of deeds of Washington county, Minnesota, on the twenty-ninth day of March, eighteen hundred and eighty-two, and was recorded in the records of said office in Book "F" of Bonds, on pages 501 and 502.

It is hereby agreed between the parties hereto and made part of this assignment that the said Hennessy is to receive a good, clear, and perfect title to the aforesaid lands through good warranty deed, with usual covenants, running either from the said Chittenden and wife to said Hennessy or from the said Bacon and wife to the said Hennessy, should it be thought proper to have the said Bacon and wife take title from said Chittenden to said lands; and it is further agreed that the said Hennessy is to pay to the said Bacon the remainder of the said five hundred dollars upon receipt and only upon receipt of such title through such deed to said lands or upon the said Hennessy accepting a deed of warranty from the said Chittenden or the said Bacon, and if the said Hennessy does not receive such title through such deed to said lands on account of any incurable defect in title or other cause the aforesaid deposit is to be refunded.

In testimony whereof both parties have hereunto set their hands and seals the twenty-seventh day of June, 1882.

21 G. V. BACON.
CHARRIE A. BACON.
D. J. HENNESSY.

Witnesses:
JAS. K. BACON.
C. A. ROHRER.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Before me, a notary public of the county of Ramsey, State of Min-

nesota, personally appeared George V. Bacon and T. J. Hennessy, to me known to be the parties who executed the foregoing contract, and they did each acknowledge they did so freely and voluntarily.

[NOTARIAL SEAL.] C. A. ROHRER,
Notary Public, Ramsey Co., Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

George V. Bacon came before me personally and, being duly sworn, doth say that he is — in the above-entitled action; that the foregoing is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters that he believes — to be true.

GEORGE V. BACON.

Subscribed and sworn to before me this 18th day of October, A. D. 1886.

[NOTARIAL SEAL.] W. J. REED,
Notary Public, Minn., Ramsey County, Minnesota.

(Endorsed:) Filed Oct. 19, 1886. C. A. Bennett, clerk.

25 Know all men by these presents that I, David J. Hennessy, as principal, & A. S. Cowley & D. A. Monfort, as sureties, are held and firmly bound unto George V. Bacon in the penal sum of five hundred dollars; the payment whereof, well and truly to be made, unto the said George V. Bacon, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon the following conditions: The said David J. Hennessy having petitioned the district court of Washington county, Minnesota, for the removal of a certain cause therein pending, wherein George V. Bacon is pl'ff and David J. Hennessy is defendant, to the circuit court of the United States in and for the district of Minnesota.

Now, if the said David J. Hennessy, the said petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 6th day of November, A. D. 1886.

DAVID J. HENNESSY. [SEAL.]
A. S. COWLEY. [SEAL.]
D. A. MONFORT. [SEAL.]

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known that on this sixth day of November, 1886, came be-

fore me personally David J. Hennessy, A. S. Cowley, & D. A.
26 Monfort, to me well known to be the same persons who executed the foregoing bond, and they severally acknowledged the same to be their own free act and deed.

[NOTARIAL SEAL.] H. C. McCARTEY,
Notary Public, Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

A. D. Cowley & D. A. Monfort came before me personally and, being by me first duly sworn, doth say, each for himself, that he is the surety above named; that he is a resident & freeholder of and in this State of Minnesota & worth the amount of five hundred dollars specified in the foregoing bond above his debts and liabilities and exclusive of his property which is exempt from execution.

A. S. COWLEY.
D. A. MONFORT.

Subscribed and sworn to before me on this sixth day of November, A. D. 1886.

[NOTARIAL SEAL.] H. C. McCARTEY,
Notary Public, Minnesota.

[Endorsed]: Filed November 9, 1886. C. A. Bennett, clerk.

27 STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

GEORGE V. BACON, Pl'ff, } Petition for Removal to the Circuit
vs. } Court of the United States, District
DAVID J. HENNESSY, Def't. } of Minnesota.

To said district court:

Your petitioner, David J. Hennessy, shows to this hon. court that the matter and amount in dispute & controversy in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between a citizen of the State of Minnesota and a native of Ireland and subject to the Kingdom of Great Britain and Ireland; that your petitioner was at the commencement of this action and still is a citizen and subject to the said Kingdom of Great Britain and Ireland, and that George V. Bacon, the plaintiff above named, was at the commencement of this action and still is a citizen and resident of the State of Minnesota.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the district of Minnesota; and he will ever pray.

28

DAVID J. HENNESSY.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

David J. Hennessy came before me personally, and, being duly sworn, doth say that he is the defendant and the petitioner in the above-entitled action; that the foregoing pleading is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

DAVID J. HENNESSY.

Subscribed and sworn to before me this 6 day of November, A. D. 1886.

[NOTARIAL SEAL.] H. C. McCARTEY,
Notary Public, Minn.

(Endorsed:) Filed 9 day of November, A. D. 1886. C. A. Bennett, clerk.

29 STATE OF MINNESOTA, }
County of Washington. }

District Court, 1st Judicial District.

GEORGE V. BACON, Pl'ff, }
vs.
DAVID J. HENNESSY, Def't. }

And now, upon reading the complaint of the plaintiff herein and upon reading and filing the petition of David J. Hennessy and approving and filing the bond of the petitioner in the above-entitled action for the removal of said suit into the circuit court of the United States—

Ordered, That said petition and bond be, and they are hereby, accepted, and that said suit be, and the same hereby is, removed from the district court of Washington county for the first judicial district, in the State of Minnesota, into the next circuit court of the United States for the district of Minnesota, and that no further proceedings be had therein in said district court.

Dated Nov. 9, 1886.

F. M. CROSBY,
Judge of the District Court.

(Endorsed:) Filed Nov. 9, 1886. C. A. Bennett, clerk.

30 STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

GEORGE V. BACON
against
DAVID J. HENNESSY. } Notice of Trial.

SIR: You will please take notice that the issues of law and fact in the above-entitled action will be brought on for trial at the next general term of the district court aforesaid, appointed to be held in and for the county of Washington, at the court-house, in the city of Stillwater, in said county, on the 9th day of November, 1886, at the opening of said court on that day, or as soon thereafter as counsel can be heard.

Yours respectfully, ROGES & HADLEY,
Attorneys for Plaintiff.

To H. C. McCartey, attorney for defendant.

(Endorsed:) Filed Oct. 19th, 1886. C. A. Bennett, clerk.

31 STATE OF MINNESOTA, }
County of Washington. }

First Judicial District.

I, C. A. Bennett, clerk of district court, Washington county and State of Minnesota, do hereby certify and return to the honorable the U. S. circuit court for the district of Minnesota that I have compared the foregoing paper-writing with the original summons, complaint, answer, reply, notice of trial, petition, bond, and order for removal to U. S. circuit court, being all the papers on record in my office in said action *in the action* therein entitled now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Stillwater, this 13th day of November, A. D. 1886.

[Seal District Court, Washington Co., Minn.]

C. A. BENNETT, *Clerk*,
By —— ——, *Deputy*.

(Endorsed:) Filed Dec. 4, 1886. Oscar B. Hillis, clerk.

32 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1886. December 14, 1886.

GEORGE V. BACON
vs.
DAVID J. HENNESSY. }

This day comes E. G. Rogers *per se* and prays leave to join as a

party complainant in the above-entitled cause, and the defendant being present by his attorney, H. C. McCartey, said motion is fully argued, duly submitted, and by the court taken under advisement.

33 United States Circuit Court, District of Minnesota. In Equity.

GEORGE V. BACON, Compl't,
ag'st
DAVID J. HENNESSY, Def't.

And now, upon due advisement, after hearing argument of removal, it is—

Ordered, That Edward G. Rogers be, and he is hereby, joined as complainant in this cause.

Ordered further, That said complainants, Edward G. Rogers and George V. Bacon, have leave to file an amended bill of complaint on or before January 1st, 1887; that said defendant have until January 20th, 1887, to file answer and serve amended bill, and that complainants have five days after said January 20th, 1887, to file replication to said answer.

Dec. 15, 1886.

R. R. NELSON, *Judge.*

(Endorsed:) Filed Dec. 15, '86. Oscar B. Hillis, clerk.

34 United States Circuit Court for the District of Minnesota.

Term Minutes, December Term, A. D. 1886. December 15, 1886.

GEORGE V. BACON
vs.
DAVID J. HENNESSY.

The motion of E. G. Rogers, Esq., for leave to join as a party complainant herein having been heretofore fully argued, duly submitted, and the court being fully advised in the premises—

It is ordered that Edward G. Rogers be, and he hereby is, joined as a complainant in this cause.

Ordered further, That said complainants, Edward G. Rogers and George V. Bacon, have leave to file an amended bill of complaint on or before January 1st, 1887.

That said defendant have until January 20th, 1887, to file answer to said amended bill, and that complainants have five days after said January 20th, 1887, to file replication to said answer.

Dec. 15, 1886.

R. R. NELSON, *Judge.*

35 United States Circuit Court, District of Minnesota.

To the honorable the judges of the circuit court of the United States for the district of Minnesota:

Edward G. Rogers and George V. Bacon, of Saint Paul, Ramsey county, State of Minnesota, and who each are now and for

more than one year last past always have been residents and citizens of said State of Minnesota, bring this their bill of complaint against David J. Hennessy, who is a resident and citizen of the State of Iowa.

And therefore your orators complain and show unto your honors that they are each the owners in fee simple of an undivided one-fourth of the property and premises hereinafter described.

That said defendant is the owner in fee simple of an undivided one-half of the property and premises hereinafter described; that said premises are situated in the county of Washington and said State of Minnesota and more fully described as follows, to wit: The southeast quarter (S. E. ¼) and the east half (E. ½) of the southwest quarter (S. W. ¼) and the northeast quarter (N. E. ¼) of the northwest quarter (N. W. ¼), all in section thirty-one (31), of township twenty-nine (29) north, of range twenty-one (21) west, according to the United States Government survey thereof. Your orators further say that, to the best of their knowledge, information, and belief, no other persons save as hereinbefore stated have any right, title, or interest in or lien upon any part or portion of said premises.

Your orators further state, upon information and belief, that said property is of the cash value of forty thousand dollars.

36 Further complaining, your orators aver and say that they and each of them desire a partition of all and every portion of said property according to the respective rights and interests of the persons interested therein, or a sale thereof and a partition of the proceeds, should it appear to this court that an actual partition thereof cannot be had without prejudice to the owners thereof.

To the end, therefore, that the said defendant may, if he can, show why your orators should not have the relief hereby prayed, your orators crave that he, the said defendant, may make full and complete answer to this your orators' bill of complaint, his answer on oath being hereby waived, and that a partition of said property be made and granted under and in accordance with the laws in such case made and provided, and in accordance with the respective rights and interests of the persons interested therein or a sale thereof, and a partition of the proceeds should it appear that an actual partition cannot be had, and that your orators may have such further and other relief in the premises as the nature of the case may require and as may be agreeable to equity.

May it please your honors to grant unto your orators the most gracious writ of subpœna of the United States of America, to be directed to the said defendant, thereby commanding him, at a certain day and under a certain pain therein to be specified, personally to appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

ROGERS & HADLEY,
Solicitors for Complainants.

EDWARD G. ROGERS, *Of Counsel.*

37 STATE OF MINNESOTA, } ss:
Ramsey County, }

Edward G. Rogers, being duly sworn, doth depose and say that he is one of the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

EDWARD G. ROGERS.

Subscribed and sworn to before me this December 29th, 1886.

J. EMERSON HADLEY,

[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

(Endorsed:) Filed Dec. 29, 1886. Oscar B. Hillis, clerk.

38 United States Circuit Court, District of Minnesota.

EDWARD G. ROGERS and GEORGE V. BACON, Plaintiffs,
vs.
DAVID J. HENNESSY, Defendant. } In Equity.

The answer of David J. Hennessy, the defendant, to the bill of complaint of Edward J. Rogers and George V. Bacon, complainants.

This defendant, saving and reserving to himself all benefits and advantage of exception or otherwise to said bill of complaint, for answer to the said bill or so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answers and says that he believes and admits that the said George V. Bacon and Edward G. Rogers are both citizens and residents of the United States and of the State of Minnesota; and this def't denies that he is a citizen of the United States or of the State of Iowa, but alleges that, on the contrary, this def't is a native of Ireland and a citizen of the Kingdom of Great Britain and Ireland, and a resident of the State of Iowa; that this def't believes and admits that he is owner in fee simple of an undivided one-half of the premises described in said bill of complaint, and that the said premises are situated in the county of Washington, Minn., and no other persons than def't and the pl'ffs have any right or title to any thereof or any lien on or interest in any part thereof save def't and the pl'ffs; but the plaintiffs have such interest or title only
39 as hereinafter set forth. Def't believes and admits that said premises are of the cash value of $40,000; but defendant alleges that he himself is the real and equitable owner of that undivided one-half of said premises to which the plaintiffs hold the record or apparent legal title, and plaintiffs hold said title only in trust for this defendant and have themselves no real or equitable title to or interest therein whatever; and, further, this defendant says that this action was commenced in the district court of Wash-

ington county, Minn., by George V. Bacon, as the pl'ff, in, to wit, Sept., 1886, and said George V. Bacon then held said pl'ffs' record title to the said undivided one-half of said property, but that this defendant answered in said action setting out the facts and equities, showing himself to be the real and equitable owner of the whole thereof, as will more fully in this answer appear, and praying the affirmative relief upon the said facts — which, under the laws and practices of said State courts, the def't was on such answer entitled; whereupon, on the filing of said answer and the removal of this case to this court, as def't is informed and believes, the said George V. Bacon conveyed an undivided one-fourth of said lands to pl'ff, Edward G. Rogers, and the said Edward G. Rogers was permitted afterwards to appear and join herein as one of the plaintiffs with said Bacon and subject to his rights and liabilities and with full notice of all the facts and equities herein set forth.

And for the particular facts showing this def't's ownership of said undivided one-half claimed by the pl'ffs, as in the bill of complaint herein, this def't avers and says that on, to wit, about March 27th, 1882, Bacon entered into an agreement with one George N.
40 Chittenden, the then owner in fee of the premises described in the complaint, and it was agreed between said Chittenden and said Bacon that said Chittenden should sell and convey said premises to said Bacon for the sum of $4,400, which said interest was in writing, duly witnessed and acknowledged and filed for record in the office of the recorder of deeds of Washington county, Minn., on the 29th day of March, 1882, and recorded in Book F of Bonds, on pages 501, 502.

That afterwards and, to wit, on or about June 27th, 1882, and while the said contract was still in force and unperformed, the said pl'ff, Bacon, and his wife and this defendant entered into an agreement whereby, in consideration of the sum of five hundred dollars to be paid by said defendant to the said Bacon, and one hundred dollars of which was thereupon paid to said Bacon, the said pl'ff, Bacon, together with his wife, sold and conveyed, transferred and assigned, to this def't all his and their right, title, and interest in and to the contract made between the said Bacon and said Chittenden, and specially agreed and covenanted with the def't that the said def't should receive a good, clear, and perfect title to the aforesaid lands through good warranty deed, with usual covenants, running either from the said Chittenden and wife to the said def't or from the said Bacon and wife to the said def't, should it be thought proper for the said Bacon and wife to take title from the said Chittenden to said lands.

And it was further decreed that the said def't should pay said Bacon the unpaid portion of said five hundred dollars upon receipt and only upon receipt of title as aforesaid through deed as aforesaid to said lands, or upon the acceptance by def't of a deed of warranty from the said Chittenden or the said Bacon to the said lands.
41 That the said contract between the pl'ff Bacon and wife and def't was in writing, was duly witnessed and acknowledged and duly filed for record in the office of the register of deeds

of Washington county, Minn., on the 21st day of August, 1882, and duly recorded in the records of said office.

That the said def't on, to wit, June 27th, 1882, tendered and offered to pay the said Chittenden the said sum of $4,400 in pursuance and fulfilment of the said contract so assigned to def't by said pl'ff, Bacon, and wife, and duly offered to fully perform each and every of the covenants and conditions to be performed by the said pl'ff, Bacon, under said contract with said Chittenden, and demanded warranty deed conveying to him a good title to said lands, which deed the said Chittenden did not at the time have or offer, but which he then and there promised to subsequently execute and deliver, and which he failed and neglected to do.

That def't has always been ready and willing to make the payments and perform the covenants required of him under the said contract and each of them, and has repeatedly so notified and informed the said pl'ff, Bacon, and the said Chittenden, and has offered full performance on his part of all his obligations under said contract.

That def't has also repeatedly demanded of said Bacon and said Chittenden the fulfilment on their part of their respective covenants and stipulations under the said contract and the conveyance to him of said lands as agreed, and that they have always failed and neglected to make such fulfilment and conveyance.

That upon information and belief def't alleges that after the transaction above set forth the plaintiff Bacon procured and obtained the title to said lands in the name of the pl'ff,
42 Edward C. Rogers, in pursuance of an understanding between said Rogers and Bacon, and that said title should be held in the name of said Rogers secret in trust for said Bacon, and that said Rogers should pretend to def't and claim that he owned the same, and that said Bacon had no interest therein, and that he should refuse to convey the title to def't, whereby the def't would be deceived and induced or compelled to relinquish his rights to said lands under said contracts, and that if successful in carrying out said scheme and perpetrating said fraud upon said def't said Rogers should receive compensation for his services and for his part in said fraudulent transactions a portion in kind of the proceeds and profits to be obtained thereby.

That in pursuance of said understanding between the said pl'ff-, Bacon & Rogers, the said Rogers took the title to the said lands and represented to the defendant that the said Bacon had no interest therein or any part thereof, and that he himself was the sole owner in fee of the said lands, and that the contract aforesaid merely constituted a cloud on his title to said lands, and that unless def't removed said cloud he would bring suit against said def't for the removal thereof, and would obtain judgment against him for costs of the said suit.

That also in pursuance of said understanding between said pl'ffs, Bacon and Rogers, and in furtherance of said scheme and fraudulent purpose, the said Bacon made similar statements to the def't as were made by the said Rogers.

That the said def't was misled and deceived by said representations and statements, and was ignorant of the understanding between said pl'ffs, and that said Bacon had any interest in the
43 title held as aforesaid by the said Rogers to the said lands, and that defendant was thereby and as a consequence thereof induced to enter into an agreement with the said Rogers, whereby the def't paid to said Rogers $2,750 in money, and gave him a quitclaim deed to an undivided one-half of said lands in a consideration of a quitclaim deed which the said Rogers made to the def't for the other undivided one-half of said land.

And that def't further alleges that the said Rogers at all times had full notice of the aforesaid contracts and of pl'ffs' rights thereunder.

And the def't further alleges that the aforesaid title of record held by the pl'ffs in the case and which in their complaint they claim to own is the title of the said undivided one-half of said lands conveyed as aforesaid by said def't to said Rogers, and that the plaintiff Bacon derives his title—that which he now pleads by conveyance—immediately to him from said Rogers, and which was in pursuance of the aforesaid fraudulent understanding between himself and the said Rogers, and that plaintiff Rogers derives his title, that which he now pleads, by said conveyance from pl'ff Bacon to him, above referred to in this answer, having then full knowledge of all facts set forth in this answer.

Pl'ff further alleges, upon information and belief, that at the time of said fraudulent agreement said pl'ffs were and had been business partners in several real-estate speculations, and that said Rogers was the confidential friend and counsel of said Bacon and was fully acquainted with all the facts in this case and with the intention of said Bacon to deceive and defraud said def't out of said lands and aided in carrying said intention into effect, and that at all times during said fraudulent transaction said Rogers was holding
44 said title and acting in regard thereto as the secret agent and trusted counsellor and abettor of said pl'ff, Bacon, and not for himself.

That said facts as to said fraud were unknown to def't until after the commencement of this suit; and the def't further alleges that the said one hundred dollars paid as aforesaid by him to pl'ff Bacon has never been returned, and that def't has always been and still is ready and willing to pay the remaining $400 which was to be paid by said def't to said pl'ff, Bacon, upon receiving title to said land as aforesaid, and to pay the balance of the purchase-money due on the said contract between the said Chittenden and the said pl'ff, Bacon, and all other sums and amounts that the said def't ought rightfully to pay, and hereby offers to pay all said sum or sums, amount or amounts, and to perform all equities.

Wherefore the def't, humbly submitting himself to the orders and decrees of this court, prays for the dismissal of this action and for his reasonable costs and disbursements in this action most wrongfully sustained.

DAVID J. HENNESSY,
By H. C. McCARTEY,
Solicitor for Defendants.

(Endorsed:) Filed Jan. 20, 1887. Oscar B. Hillis, clerk.

45 United States Circuit Court, District of Minnesota.

EDWARD G. ROGERS and GEORGE V. BACON, Complainants,
against
DAVID J. HENNESSY, Defendant.

The Replication of Complainants to the Answer of Defendant.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatever in the said answer contained material of effectual in the law to be replied unto, confessed, avoided, traversed, or denied is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill of complaint they have already prayed.

ROGERS & HADLEY,
Solicitors for Complainants.

E. G. ROGERS, *Of Counsel.*

(Endorsed:) Filed Jan'y 22, 1887. Oscar B. Hillis, clerk.

46 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1888. June 18, 1888.

GEORGE V. BACON *et al.*
vs.
DAVID J. HENNESSY.

DAVID J. HENNESSY.
vs.
GEORGE V. BACON *et al.*

The above-entitled causes regularly coming on for hearing, the parties appeared, by their respective solicitors, Lusk and Bunn appearing for George V. Bacon and E. G. Rogers and D. W. Lawlor appearing for David J. Hennessy. Thereupon said causes are fully heard upon the pleadings, proofs, and arguments of counsel, duly submitted, and by the court taken under advisement.

47 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1888. June 27, 1888.

GEORGE V. BACON and EDWARD G. ROGERS
vs.
DAVID J. HENNESSY.

DAVID J. HENNESSY
vs.
GEORGE V. BACON and EDWARD G. ROGERS.

The above-entitled causes, having been heretofore fully heard upon the pleadings, proofs, and arguments of counsel, duly submitted, and by the court taken under advisement, now, the court, after due consideration thereof and being fully advised in the premises, announces its decision concerning same.

Pursuant thereto it is hereby ordered and decreed that a decree be entered in said cause dismissing the cross-bill and decreeing a partition.

48 United States Circuit Court, District of Minnesota.

GEORGE V. BACON and EDWARD G. ROGERS
vs.
DAVID J. HENNESSEY.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the cross-bill therein be and is dismissed, and that said complainants, George V. Bacon and Edward G. Rogers, are each the owners in fee simple of an undivided one-fourth and said defendant Hennessey is the owner in fee simple of an undivided one-half of the following-described property, situated in the county of Washington and State of Minnesota, described as follows, to wit:

The southeast quarter (S. E. ¼) and the east half of the southwest quarter (E. ½ of the S. W. ¼) and the northeast quarter of the northwest quarter (N. E. ¼ of the N. W. ¼), all in section thirty-one (31), of township (29) twenty-nine north, of range twenty-one (21) west, according to the United States Government survey thereof; and that a partition be made of said property, and that one-fourth thereof be allotted as the share of the complainant, George V. Bacon, and that one-fourth thereof be allotted as the share of the complainant, Edward G. Rogers, and that the other half be allotted as the share of the defendant, David J. Hennessy, and that the complainants and defendant hold and enjoy their respective shares in severalty according to such allotments, and that they execute mutual con-

49 veyances to each other of such respective shares according to their respective interests therein, and if the parties differ about the number of commissions or any other matter relating to

the issuing of such commissions B. J. Shipman, Esq., master in chancery, is hereby appointed to settle the same between them, and said conveyances are also to be settled by the said master in case the parties differ about the same.

And it is further ordered that all deeds and writings relating to the said real estate in the custody or power of any of the parties be produced before the commissioners upon oath as they shall require.

And it is further ordered that the commissioners be at liberty to examine witnesses upon oath and to take the depositions in writing and return the same with the commission; and whereas the defendant has prayed an appeal to the Supreme Court of the United States from this decree, such appeal is hereby ordered and allowed in open court, and it is ordered that said appeal operate as a supersedeas on the filing of a bond by or on behalf of the defendant in the sum of one thousand dollars, to be approved by the circuit judge of this court; liberty to apply.

DAVID J. BREWER,
Circuit Judge.

Entered in Term Minutes "H," page 46, on the 15th day of Sept., 1888.

Defendant consents to the within form of decree.

DAN. W. LAWLER,
For Defendant.

St. Paul, Aug. 30th, 1888.

50 United States Circuit Court, District of Minnesota. In Equity.

Pleas before the honorable the judges of the United States circuit court of America, at the June term of said court, for the district of Minnesota, held in the city of St. Paul, in said district, in the year of our Lord 1888, and of our Independence the 113th year.

DAVID J. HENNESSEY
vs.
EDWARD G. ROGERS and GEORGE V. BACON.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 7th day of February, 1887, came the complainant above named, by H. C. McCarthy, his solicitor, and filed in the clerk's office of said court his cross-bill in the suit of George V. Bacon *vs.* David J. Hennessy; which said cross-bill is in the words and figures following:

Cross-Bill.

51 To the judges of the circuit court of the United States for the district of Minnesota:

David J. Hennessy, a citizen and subject of the Kingdom of Great Britain and Ireland, a native of Ireland, and a resident of

Dubuque, in the State of Iowa, brings this his cross-bill against Edward G. Rogers, a resident and citizen of the State of Minnesota, and George V. Bacon, a resident and citizen of the State of Minnesota; and thereupon your orator complains and says that said Edward G. Rogers & George V. Bacon, on or about the 29th day of December, 1886; filed their bill in this honorable court against your orator, thereby praying they and each of them have a partition of all and every portion of the following described real estate, to wit:

The southeast quarter (S. E. ¼) and the east half (E. ½) of the southwest quarter (S. W. ¼) and the northeast quarter (N. E. ¼) of the northwest quarter (N. W. ¼), all in section thirty-one (31), of township twenty-nine (29) north, of range twenty-one (21) west, according to the United States Government survey thereof, the same being situated in Washington county, Minn., according to the respective rights and interests of the persons interested therein or a sale thereof, and a partition of the proceeds, should it appear to this court that an actual partition thereof cannot be had without prejudice to the owners thereof.

And your orator further complains and says that your orator is the owner in fee simple of an undivided one-half of said premises above described, and that the said Edward G. Rogers & George V. Bacon, the defendants herein, are the holders of the apparent legal title of record each of an undivided one-fourth of said premises, but that your orator is the real and equitable owner of the said
52 apparent legal title of record so held as aforesaid by the said Edward G. Rogers and George V. Bacon, and that they have no rightful or equitable title thereto or interest therein whatever, but held the same in trust for your orator.

And your orator further complains and says that on, to wit, about March 27th, 1882, the said George V. Bacon (one of defendants herein) entered into an agreement in writing with one George N. Chittenden, who then was the owner in fee of the said real estate, and it was agreed between said Chittenden and said Bacon that said Chittenden would sell and convey said premises to said Bacon for the sum of $4,400, which said contract was in writing, duly witnessed and acknowledged and filed for record in the office of the register of deeds of Washington county, Minn., on the 29th day of March, 1882, and duly recorded in Book K of Deeds, on pages 501 & 502.

And your orator further complains and says that afterwards and, to wit, on or about June 27th, 1882, and while the said contract was still in force and unperformed, the said George V. Bacon and Charrie A. Bacon, his wife, entered into a contract with your orator in writing, whereby in consideration of the sum of five hundred dollars to be paid by your orator to the said George V. Bacon, one hundred dollars of which was thereupon paid by your orator to the said George V. Bacon, the said George V. Bacon and his said wife (defendant herein) sold and conveyed, transferred and assigned to your orator all his and their (the said George V. Bacon and his said wife, defendants herein) right, title, and interest in and to the contract so made between the said George V. Bacon and George N.

Chittenden, and in and by the said contract between the said
53 George V. Bacon and his said wife and your orator the said George V. Bacon and his said wife further expressly covenanted and agreed with your orator that your orator should receive a good, clear, and perfect title to the aforesaid real estate through good warranty deed, with usual covenants, running either from the said Chittenden and his said wife to your orator, or from the said George V. Bacon and his said wife to your orator, should it be thought proper for the said Bacon and wife to take title from the said Chittenden to said lands.

And your orator further complains and says that in said contract it was further agreed that your orator should pay to the said Bacon the unpaid portion of said five hundred dollars upon receipt, and only upon receipt, of title as aforesaid through deed as aforesaid to said lands, or upon the acceptance by your orator of a deed of warranty from the said Chittenden or the said Bacon to the said lands, and that said contract was duly witnessed and acknowledged and filed for record in the office of the register of deeds of Washington county, Minn., on the 21st day of August, 1882, and duly recorded in the records of said office.

And your orator further complains and says that on or about, to wit, June 27th, 1882, your orator duly tendered and offered to pay to the said George N. Chittenden the said sum of $4,400, in pursuance and fulfilment of the said contract so assigned to your orator as aforesaid by said George V. Bacon and Charrie A. Bacon, and duly offered to fully perform each and every of the covenants and conditions to be performed by the said George V. Bacon under said contract with said Chittenden, and demanded a warranty deed conveying to your orator a good title to said lands, which deed the said Chittenden was not at the time prepared to give and did not
54 at the time have or offer, but which he then and there promised to subsequently execute and deliver, and which he failed and neglected to do.

And your orator further complains and says that your orator has always been ready and willing, anxious and desirous, to make the payments and perform the covenants required of him under the said contracts and each of them, and has repeatedly so notified and informed the said George V. Bacon and the said George N. Chittenden, and has repeatedly offered full performance on his part of all his obligations under said contracts and each of them.

And your orator further complains and says that he has repeatedly demanded of said George V. Bacon and of said George N. Chittenden the fulfilment on their part of their respective covenants and stipulations under the aforesaid contracts and the conveyance to your orator of said land as agreed, and that they have always failed and neglected to make such fulfilment and conveyance.

And your orator further alleges and says that your orator is informed and verily believes and thereupon avers that after the transactions above set forth the said George V. Bacon procured and obtained the title to said lands in the name of the said Edward G. Rogers in pursuance of an understanding between the said George

V. Bacon and Edward G. Rogers (defendants herein); that said title should be taken and held in the name of said Edward G. Rogers in secret trust for said George V. Bacon, and that said Edward G. Rogers should pretend and claim to your orator that he (the said Edward G. Rogers) owned the same, and that the said George V. Bacon had no interest therein, and that the said Edward G. Rogers
55 should refuse to convey the title to your orator, whereby your orator would be deceived and would be induced or compelled to relinquish his rights to said lands under the aforesaid contracts, and that if successful in carrying out said scheme and perfecting said fraud upon your orator the said Edward G. Rogers should receive as compensation for his services and for his part in said fraudulent transaction a portion in kind of the proceeds and profits to be obtained thereby.

And your orator further complains and says that he is informed and verily believes and thereupon avers that, in pursuance of said fraudulent understanding between the said George V. Bacon and the said Edward G. Rogers, the said Edward G. Rogers took and obtained the title to the said lands, and stated and represented to your orator that he (the said Edward G. Rogers) was the sole owner in fee simple of the said lands, and that the said George V. Bacon had no interest therein, and that the aforesaid contracts between your orator and said George V. Bacon and Charrie, his wife, and between said George V. Bacon and said George N. Chittenden merely constituted a cloud on the title of the said Edward G. Rogers to said lands, and that unless your orator released the same he would bring suit against your orator for the removal of said cloud and obtain judgment against your orator for the costs of said suit.

And your orator further complains and says that, in pursuance of the aforesaid fraudulent understanding between said George V. Bacon and said Edward G. Rogers and in furtherance of said scheme and fraudulent purpose, the said George V. Bacon made similar statements to your orator as were made by the said Edward G. Rogers as aforesaid.

56 And your orator further complains and says that your orator was misled and deceived by the said representations and statements of the said Edward G. Rogers and the said George V. Bacon, and was ignorant of the aforesaid understanding and collusion between them, and did not know that the said George V. Bacon had any interest in the title held as aforesaid by the said Edward G. Rogers in trust for the said Bacon, and did not know that the said George V. Bacon had any interest therein, and your orator was thereby, as a consequence thereof, induced to enter into an agreement with the said Edward G. Rogers, whereby your orator paid to said Edward G. Rogers $2,750 in money, and made to him a quitclaim deed to an undivided one-half of said lands in consideration of a quitclaim deed which the said Edward G. Rogers and Mary M. Rogers, his wife, made to your orator for the other undivided one-half of said land.

And your orator further complains and says that the said Edward G. Rogers had full notice of the aforesaid contracts between your

orator and said George V. Bacon and between said George V. Bacon and said George N. Chittenden and of all your orator's rights thereunder.

And your orator further complains and says that the aforesaid title of record held by the said Edward G. Rogers to an undivided one-fourth and of said George V. Bacon to an undivided one-fourth of said lands, which in their said bill of complaint they claim to own, is the title to said undivided one-half of said premises conveyed as aforesaid by your orator to said Edward G. Rogers,

57 and which the said Edward G. Rogers afterwards, in pursuance of said agreement and understanding between himself and said George V. Bacon, conveyed to said George V. Bacon, and the said George V. Bacon reconveyed to said Edward G. Rogers an undivided one-fourth of the said lands, and that the said Edward G. Rogers and George V. Bacon held said title through said conveyances, procured as aforesaid and not otherwise.

And your orator further alleges and shows that he is informed and verily believes and thereupon avers that at the time of said fraudulent arrangement the said George V. Bacon and Edward G. Rogers were and had been business partners in several real-estate speculations, and that said Edward G. Rogers was the confidential friend and counsel of said George V. Bacon, and was fully acquainted with all the facts above stated and with the intention of said George V. Bacon to deceive and defraud said defendant out of said lands, and aided in carrying said intention into effect, and that at all times during said fraudulent transaction said Rogers was holding said title and acting in regard thereto as the secret agent and trustee, counselor and abettor of said George V. Bacon and not for himself.

And your orator further alleges and shows that the said one hundred dollars paid as aforesaid to the said George V. Bacon by your orator has never been returned, and that your orator has always been and still is able, ready, anxious, and desirous of paying the remaining $400, which was to be paid by him to said George V. Bacon upon receiving title as aforesaid, and to pay the balance of the purchase-money due on the said contract between said George N. Chittenden and George V. Bacon and all other sums and amounts that your orator ought rightfully pay, and hereby offers to pay all said sum or sums, amount or amounts, and to perform all equities.

58 And your orator further alleges and states that after the contract aforesaid made between your orator and said George V. Bacon, whereby your orator purchased said lands, the said property began to increase rapidly and very notably in value, and that forthwith the said George V. Bacon manifested an unwillingness that your orator should be invested with a good title thereto, and sought by various arts and pretences to delay and prevent the transfer of the title of said lands to your orator and avoided obtaining the title thereto openly in his own name and sought how he might evade the obligations of his said contract with your orator.

And your orator further alleges and shows that the title of said

lands in said George N. Chittenden, as above stated, was, at the date of the said contract of sale and long afterwards, subject to certain clouds and defects of record that existed upon it, but which defects were curable and capable of being cleared and removed, and which the said George N. Chittenden and the said George V. Bacon, as your orator is informed and verily believes and thereon avers, were fully informed and were fully able to clear off and remove from the record, and that the said George V. Bacon did, in pursuance of a design to evade the performance of his contract with your orator, procure, obtain, and withhold from the record the evidence and documents necessary to free the title to said lands from said clouds and defects, and did thereafter enter into the aforesaid fraudulent agreement with the said Edward G. Rogers, and did put said documents and evidences into the hands of said Edward G. Rogers and assist the said Edward G. Rogers in obtaining said title, and did procure the said George N. Chittenden to make conveyance of said land to said
59 Rogers in pursuance of the aforesaid fraudulent agreement between them, and that said Chittenden in conveying said lands to said Rogers was acting fraudulently and in bad faith; and your orator further complains and says that the said George V. Bacon and Edward G. Rogers, combining and confederating together, have lately filed their bill in this honorable court against your orator as the owner of an undivided one-half of said premises, claiming and pretending that they, the said George V. Bacon and Edward G. Rogers, are each the owners in fee of an undivided one-fourth of said premises and praying a partition thereof, as hereinbefore set forth.

And your orator duly appeared and put in his answer thereto; to which answer the said George V. Bacon and Edward G. Rogers have filed their replication.

To the end, therefore, that the said George V. Bacon and Edward G. Rogers may, if they can, show why your orator should not have the relief herein prayed, your orator prays that they, the defendants in this cross-bill, may make full and complete answer to this (your orator's cross-bill of complaint), their answer on oath being hereby waived, and that the issues may be made upon this bill, and the answer of said defendants, if any, and the replication thereto, if any, and the evidence, trial, and hearing may be had at the same time as the same is had upon the issues joined between said Rogers and Bacon and your orator as aforesaid; that the complaint of said Edward G. Rogers and George V. Bacon be dismissed; that the said deed from your orator to said Edward G. Rogers be set aside and declared void, and that an account be taken of the amount which your orator in equity ought to pay on the said lands, and that he be permitted to pay the same to the party or parties entitled
60 thereto, and that the said George V. Bacon and Edward G. Rogers and their said wives be required to convey to your orator the said premises, and that your orator be decreed to be the owner thereof, and that your orator have damages if for any reason a perfect title to said premises cannot be made to him of the whole or of any portion thereof, and that your orator may have such fur-

ther and other relief in the premises as the justice of the case may require and as may be agreeable to equity.

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said defendants, thereby commanding them, at a certain day and under certain pain therein to be specified, personally to appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to and to perform and abide such order and decree therein as to your honors shall seem meet and agreeable to equity and good conscience; and your orator will ever pray.

H. C. McCARTHY,
Solicitor for David Hennessy, Complainant, St. Paul, Minn.

(Endorsed:) Filed Feb. 7th, 1887. Oscar B. Hillis, clerk.

61 And on the same day, to wit, the 7th day of February, 1887, the following order for appearance was entered in the Common Rule Register, page 220, in the words and figures following:

Order for Appearance. March 7th, 1887.

DAVID J. HENNESSY
vs.
EDWARD G. ROGERS *et al.*

And now come the defendants, by Rogers & Hadley, solicitors, on whose motion it is ordered that the appearance of said defendants be, and the same is hereby, entered.

62 United States Circuit Court, District of Minnesota.

DAVID J. HENNESSY, Complainant,
against
EDWARD G. ROGERS and GEORGE V. BACON, Defendants. } In Equity.

The joint and several answer of Edward G. Rogers and George V. Bacon to the cross-bill of complaint of David J. Hennessy, complainant.

These defendants, now and at all the times hereinafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complaint contained, for answer thereunto, — so much and such parts thereof as these defendants are advised is material or necessary for them to make answer to, these defendants, answering, saith:

First. That they admit the citizenship of the complainant and defendants as in said bill of complaint alleged.

Second. These defendants admit that on or about the 29th day of December, 1886, they filed in this honorable court their bill of complaint against the said complainant herein, David J. Hennessy,

thereby praying that they and each of them have a partition of all and every portion of all the following-described real estate, to wit:

The southeast quarter (S. E. ¼) and the east half (E. ½) of the southwest quarter (S. W. ¼) and the northeast quarter (N. E.
63 ¼) of the northwest quarter (N. W. ¼), all in section thirty-seven (37), of township twenty-nine (29) north, of range twenty-one (21) west, according to the United States Government survey thereof, the same being situated in Washington county, Minnesota, according to the respective rights and interests of the persons interested therein for a sale thereof and a partition of the proceeds should it appear to this court that an actual partition thereof cannot be had without prejudice to the owners thereof.

Third. These defendants admit that on the 27th day of March, 1882, the defendant, George V. Bacon, entered into a certain contract with one George N. Chittenden, who — declared then and there to be the owner of the said above-described premises, for the purchase thereof for the sum of $4,400.00 on the terms and conditions stated in said contract, which contract was recorded in the office of the register of deeds of Washington county, Minnesota, on the 29th day of March, 1882, in Book "F" of Bonds, on pages 501 and 502, and which is hereto attached and marked Exhibit "A" and hereby made a part hereof.

Fourth. These defendants admit that afterwards and on or about the 27th day of June, 1882, defendant, George V. Bacon, and Charrie A. Bacon, his wife, — the said complainant made and entered into a certain contract in reference to said above-described lands, a copy of which is hereto attached, marked "Exhibit B," and hereby made a part hereof, this being the same contract referred to in the bill of complaint of complainant herein, and was recorded in the office of the register of deeds of said Washington county on the 21st day of August, 1882, in Book "F" of Bonds, on page 600; that the complainant then and there paid the defendant, George V. Baxon, the sum of one hundred dollars.

64 Fifth. Further answering, said defendants especially deny that said complainant, on the 27th day of June, 1882, or at any other time or place, ever tendered or offered to pay to said George N. Chittenden or to any one for him the sum of $4,400.00 or any other sum in pursuance or fulfilment of said first-mentioned contract as assigned by defendant Bacon and wife to said complainant in said last-mentioned contract in any way or manner whatever, either as stated in said bill of complaint or otherwise.

These defendants further specifically and especially deny that said complainant ever offered or was ever ready or willing to perform the covenants and conditions of said contracts on his part to be done and performed, either with said Chittenden or said defendant Bacon in any way or manner, but has always neglected and refused so to do, although he has frequently and persistently been importuned so to do, both by said Chittenden and this defendant Bacon; that said Chittenden and this defendant Bacon were always willing and anxious to perform said contract on their part and respectively offered so to do, but said complainant wholly refused and

repeatedly neglected to perform the terms and conditions of said contract on his part, in whole or in part, and utterly neglected and refused to take said property or pay for the same in any way or manner.

Sixth. Further answering, said defendants allege that on the 30th day of September, 1885, the defendant, Edward G. Rogers, purchased of one John B. Sanborn and wife all the right, title, and interest of said Sanborn and wife in and to the property and premises heretofore described herein, and said Sanborn and wife conveyed and transferred all their interest in said premises and conveyed to said defendant Rogers all liens on said land, by way of mortgage
65 or otherwise, owned by said John B. Sanborn, and in consideration whereof said Rogers then and there paid said Sanborn the sum of one thousand dollars in cash, all of which more fully appears from the records in the office of the register of deeds in said Washington county; and said defendant Rogers did also thereafter purchase from the said George N. Chittenden and wife the said property and premises, paying said Chittenden the sum and amount of four thousand seven hundred five and $\frac{87}{100}$ dollars therefor, and said George N. Chittenden and wife executed and delivered to said defendant Rogers a full covenant — warranty deed therefor, which deed was filed for record in the office of the register of deeds of said Washington county on the 4th day of November, 1885, in Book 15 of Deeds, on page 445, and to which reference is hereby made for greater certainty; that thereby the said defendant Rogers became and was then and there the sole owner of said property and all of the same, subject to whatever rights said defendant had acquired or held under and by virtue of the said contracts hereto annexed, marked Exhibits "A" and "B," as aforesaid. Said defendants further say that in all of said transactions in the purchase from said Sanborn and in the purchase from said Chittenden said defendant Rogers acted for himself and in his own behalf and not for or in behalf or on account of defendant Bacon in any way or manner, either as stated in said bill of complaint or otherwise; and said defendants and each of them deny all and all manner of fraudulent combination between them to cheat and defraud — said defendant Rogers bought said property or any part thereof in trust for defendant Bacon or for defendant Bacon in any way or manner whatever, and deny that said defendant Rogers took the title to said
66 property or any part thereof in his name in trust for or for the benefit and advantage of this defendant Bacon in any way or manner, either as stated in said bill of complaint or otherwise; and said defendants deny that said complainant was misled or deceived by any act or acts, statement or statements, of these defendants or either of them, either as stated in said bill of complaint or otherwise; and the defendant Rogers, further severally answering, saith he denies, and this defendant Bacon believes such denial to be true, that said defendant Rogers stated and represented to said complainant that he, said defendant Rogers, was the sole owner in fee of said lands, and that the said George V. Bacon had no interest therein, and that the aforesaid contracts between said George V.

Bacon and said George N. Chittenden merely constituted a cloud on the title of said defendant Rogers to said lands, or that unless said complainant released the same he, Rogers, would bring suit against complainant for the removal of said cloud and obtain judgment against complainant for the costs of suit, or that said defendant made any statements to complainant whatever regarding the title of said property and the ownership thereof, except to say that he, said Rogers, was the owner thereof.

And this defendant Bacon, further severally answering, saith he denies, and this defendant Rogers believes such denial to be true, that said defendant Bacon made to said complainant any statement or statements whatever regarding the title to said property and the ownership thereof, either as alleged in the bill of complaint or otherwise, and denies that he ever manifested any unwillingness that the complainant should be invested with a good title to said land, and that he sought by any acts or pretences or otherwise to delay
67 and prevent the transfer of the title to said land to complainant, and said defendant admits that the title to said lands in said George W. Chittenden was defective and subject to various serious clouds and defects, but defendant Bacon denies and defendant Rogers believes such denial to be true that he, Bacon, was ever able to clear off and remove from the record said clouds and defects, or that said defendant Bacon ever had in his possession or under his control in any way or manner whatever the evidence and documents necessary to free the title of said lands from said clouds and defects, and said defendants deny that said defendant Bacon put any such documents or evidence into the hands of defendant Rogers, or that he assisted said Rogers in obtaining said title in any way or manner whatever.

Seventh. Further answering, said defendants allege that, said defendant Rogers so being the owner of said property as aforesaid and said complainant so claiming an interest therein under said contracts, Exhibits "A" and "B," as aforesaid, on the 19th day of March, 1886, they made and entered into a certain contract in writing wherein and whereby, to finally settle the title to said land and all matters in dispute between said defendant Rogers and said complainant and said defendant Bacon and said complainant in relation thereto, said defendant Rogers in consideration of the sum of $2,750 in cash to be paid him by said complainant and an assignment to him by said complainant of the sum of one hundred dollars, which said complainant claimed defendant Bacon owed him on account of the payment of one hundred dollars by complainant to defendant Bacon, and being the same one hundred dollars mentioned in complainant's bill of complaint—said defendant
68 Rogers agreed to put all papers relating to the title of said land in his possession unrecorded on record, and execute and deliver to said complainant a deed of an undivided one-half interest in all of said premises and land, and said complainant, in further consideration thereof, was to and did then and there agree to settle and did then and thereby settle, forego, compromise, and compound all claims and demands of every kind and nature which he had or

claimed to have against defendant Bacon or said George N. Chittenden arising from or growing out of any transaction relating to the property and real estate in dispute, and said complainant was also, by the terms of said settlement, to make, execute, and deliver to said Rogers a deed to an undivided one-half of said premises.

That afterwards, in pursuance of said agreement, said defendant Rogers recorded all papers as provided in said agreement and delivered to said complainant the deed as aforesaid and did all the acts and things on his part to be done and performed under and in accordance with said agreement, and said complainant executed and delivered to said defendant Rogers a deed as provided in said agreement and paid said defendant Rogers the sum of $2,750.00 in cash and assigned said account of $100.00 to said defendant Rogers, and the whole matter and all matters in dispute in relation to said land were wholly and entirely and finally settled.

Eighth. Further answering, defendants allege that said complainant derived and obtained his title to an undivided one-half interest in said premises by virtue of the foregoing compromise and settlement and deed from defendant Rogers, and not otherwise.

69 Said defendants further say that after said settlement, as aforesaid, said defendant Rogers deeded to defendant Bacon, for a good and valuable consideration, an undivided one-fourth interest in said premises, and that while said defendant Bacon was so the owner of one-fourth of said premises and defendant Rogers the owner of one-fourth of said premises and said complainant the owner of an undivided one-half of said premises as aforesaid, and on or about the 19th day of April, 1886, said complainant and these defendants joined in an action as plaintiffs against one A. M. Torbet in the district court of Ramsey county, Minnesota, to have — declared and decreed as a lien on said premises; that said suit was instituted and carried to judgment with the full knowledge and consent of said complainant and at his request.

That the files and records of said court are hereby referred to for greater certainty.

Defendants further say that on the 21st day of August, 1886, the defendant Bacon purchased of said Rogers an undivided one-fourth interest in said lands for the sum and amount of about ten thousand dollars, then and there paid said defendant Rogers by defendant Bacon; that the said defendant Bacon thereby and by reason of said purchase as aforesaid became the owner of an undivided one-half of the property and premises above mentioned, and not otherwise.

That subsequent thereto and on the 22 day of November, 1886, said defendant Bacon, for a valuable consideration, to wit, the sum of ten thousand dollars, sold and reconveyed to defendant Rogers an undivided one-fourth of said land, and that said defendant Bacon and defendant Rogers now each own an undivided one-fourth of said land.

70 And these defendants each severally deny all and all manner of unlawful combination and confederacy wherewith they are in said bill charged, without this, that there is any other

matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants; all which matters and things *this* defendants *is* ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in their behalf most wrongfully sustained.

ROGERS & HADLEY,
Solicitors for Defendants.

E. G. ROGERS, *Of Counsel.*

71 EXHIBIT "A."

This agreement, made and entered into at Saint Paul, Minnesota, this twenty-seventh day of March, 1882, by and between George N. Chittenden, of Plainfield, Will county, State of Illinois, and George V. Bacon, of the town of Woodbury, Washington county, State of Minnesota, witnesseth:

That the said George N. Chittenden has sold and doth agree to convey in fee simple unto the said George V. Bacon, his heirs and assigns forever, by a good and sufficient deed of general warranty on or before the twenty-seventh (27) day of June, 1882, upon the punctual payment by said George V. Bacon of the consideration money hereinafter mentioned, the following lands, situated in the town of Oakdale, Washington county, Minnesota, to wit, southeast one-quarter (S. E. ¼) and east one-half of southwest quarter (E. ½ of S. W. ¼), and the northeast one-quarter of the northwest quarter (N. E. ¼ of N. W. ¼), all in section thirty-one (31), town. twenty-nine (29), range twenty-one (21), together with all the rents, profits, and appurtenances to the same belonging, and the said George V. Bacon does covenant and agree to and with George N. Chittenden, his heirs and assigns,—the sum of four thousand four hundred dollars, the consideration money of said premises, at such a time as the said George N. Chittenden shall execute a sufficient deed of general warranty. It is understood and agreed by and between the parties to this agreement that if the said George V. Bacon fails to pay the said consideration money, then this agreement is void, time being of the essence of this agreement.

In testimony whereof the said George N. Chittenden and George V. Bacon have hereunto set their hands and seals the
72 day and year first above written.

GEORGE N. CHITTENDEN. [SEAL.]
GEORGE V. BACON. [SEAL.]

Signed & sealed in presence of us—the words time being of the essence of this agreement, inserted in lines 5 & 6 above, inserted before execution and delivery hereof—

E. S. CHITTENDEN.
W. S. TIMBERLAKE.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known that on this 27th day of March, A. D. 1882, before me came personally George N. Chittenden and George V. Bacon, to me known to be the persons described in and who executed the foregoing contract, and they severally acknowledged that they executed the same freely and voluntarily.

[SEAL.] EDWIN S. CHITTENDEN,
Notary Public, Ramsey County, Minnesota.

73 EXHIBIT "B."

Received, Saint Paul, Minnesota, this twenty-seventh day of June, eighteen hundred and eighty-two, of David J. Hennessy, of Dubuque, Iowa, one hundred dollars in part payment of five hundred dollars, in consideration of which we, George V. Bacon and Charrie A. Bacon, his wife, do hereby assign, transfer, and convey all *my* right, title, and interest in and to a certain agreement and bargain of sale bearing date the twenty-seventh day of March, eighteen hundred and eighty-two, and made and entered into by and between George N. Chittenden, of Plainfield, Will county, State of Illinois, and George V. Bacon, of Washington county, Minnesota, for the sale and transfer from said Chittenden to the said Bacon of the following lands, situate in the county of Washington, State of Minnesota, to wit: Southeast one-quarter (S. E. ¼) and east half of southwest quarter (E. ½ of S. W. ¼) and northeast quarter of the northwest quarter (N. E. ¼ of N. W. ¼) of section thirty-one (31), town. twenty-nine (29), and range twenty-one (21) west of principal meridian. The said agreement and bargain of sale is the same that was filed in the office of the register of deeds of Washington county, Minnesota, on the twenty-ninth day of March, eighteen hundred and eighty-two, and was recorded in the records of said office in Book F of Bonds, on pages 501 and 502. It is hereby agreed between the parties hereto and made a part of this assignment that the said Hennesy is to receive a good, clear, and perfect title to the aforesaid lands, through good warranty deed, with usual covenants, running either from the said Chittenden and wife to the said Hennesy or from said Bacon and wife to the said Hennesy, should it be thought
74 proper to have the said Bacon and wife take title from said Chittenden to said lands: and it is further agreed that the said Hennesy is to pay to the said Bacon the remainder of the said five hundred dollars upon receipt, and only upon receipt, of such title through such deed to said lands or upon the said Hennesy accepting a deed of warranty from the said Chittenden or the said Bacon; and if the said Hennesy does not receive such title through such deed to said lands on account of any incurable defect in title or other cause the aforesaid deposit is to be refunded.

In testimony whereof both parties have hereunto set their hands and seals the twenty-seventh day of June, 1882.

G. V. BACON.
CHARRIE A. BACON.
D. J. HENNESY.

Witnesses:
JAS. K. BACON.
C. A. ROHRER.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Before me, a notary public of the county of Ramsey, State of Minnesota, personally appeared George V. Bacon and D. J. Hennessy, to me known to be the parties who executed the foregoing contract, and they did each acknowledge they did so freely and voluntarily.

C. A. ROHRER,
[SEAL.] *Notary Public, Ramsey Co., Minnesota.*

(Endorsed:) Filed April 4, 1887. Oscar B. Hillis, clerk.

75 United States Circuit Court, District of Minnesota.

DAVID J. HENNESSY, Complainant,
against
EDWARD G. ROGERS and GEORGE V. BACON, Defendants. } In Equity.

The Replication of Complainant to the Answer of Defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors and uncertainties and insufficiencies of the answer of said defendants, for replication thereunto says that he will and doth aver, maintain, and prove the bill of complaint by him filed in this cause to be true, certain, and sufficient in law to be answered unto by the said defendants, and that the answer is very uncertain, evasive, and insufficient in law to be replied unto by this repliant, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and confessed, transversed, or denied or avoided is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court may direct, and humbly prays as in and by his said bill of complaint aforesaid he has heretofore prayed.

H. C. McCARTEY,
Solicitor for Complainant.

(Endorsed:) Filed April 9, 1887. Oscar B. Hillis, clerk.

76 Circuit Court of the United States for the District of Minnesota. In Equity.

DAVID J. HENNESSY, Complainant,
vs.
EDWARD G. ROGERS and GEORGE V. BACON, Defendants.

The motion of the defendants for the assignment of a term probatory in said cause came on to be heard, McCartey & Marvin appearing for said complainant and Rogers & Hadley for said defendants.

Whereupon it is ordered that the complainant have sixty days from this date in which to take the evidence in support of the bill, and that the defendants have sixty days thereafter in which to take his evidence in defense, and that the complainant have twenty days thereafter in which to take the evidence in reply, and that no further evidence shall be taken in the cause unless the court, on motion, for cause shown, shall otherwise order.

Dated May 27, 1887.

R. R. NELSON, *Judge.*

(Endorsed:) Filed May 27, 1887. Oscar B. Hillis, clerk.

77 United States Circuit Court, District of Minnesota.

Term Minutes, June Term, A. D. 1888. June 18th, 1888.

GEORGE V. BACON *et al.*
vs.
DAVID J. HENNESSY.

DAVID J. HENNESSY
vs.
GEORGE V. BACON *et al.*

The above-entitled causes regularly coming on for hearing, the parties appeared by their respective solicitors, Lusk & Bunn appearing for Geo. V. Bacon and E. G. Rogers and D. W. Lawler appearing for David J. Hennessy; thereupon said causes are fully heard upon the plaintiffs' proofs and arguments of counsel duly submitted and by the court taken under advisement.

78 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, 1888. June 27th, 1888.

GEORGE V. BACON and EDWARD G. ROGERS
vs.
DAVID J. HENNESY.

DAVID J. HENNESY
vs.
GEORGE V. BACON and EDWARD G. ROGERS.

The above-entitled causes having been heretofore fully heard upon

the pleadings, proofs, and arguments of counsel duly submitted and by the court taken under advisement, now, the court, after due consideration thereof, and being fully advised in the premises, announces its decision concerning same.

Pursuant thereto, it is hereby ordered and decreed that a decree be entered in said cause dismissing the cross-bill and decreeing a partition.

79 United States Circuit Court, District of Minnesota.

Term Minutes, June Term, A. D. 1888. Sept. 15th, 1888.

GEORGE V. BACON and EDWARD G. ROGERS, Complainants,
vs.
DAVID J. HENNESSY, Defendant.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the cross-bill therein be and is dismissed, and that said complainants, George V. Bacon and Edward G. Rogers, are each the owners in fee simple of an undivided one-fourth, and said defendant, Hennessy, is the owner in fee simple of an undivided one-half of the following-described property, situated in the county of Washington, State of Minnesota, described as follows, to wit:

The southeast quarter and the east half of the southwest quarter and the northeast quarter of the northwest quarter, all in section thirty-one, of township twenty-nine north, of range twenty-one west, according to the United States Government survey thereof, and that a partition be made of said property, and that one-fourth thereof be allotted as the share of the complainant, George V. Bacon, and that one-fourth thereof be allotted as the share of the complainant, Edward G. Rogers, and that the other half be allotted as the share of the defendant, David J. Hennessy, and that the complainants and defendant hold and enjoy their respective shares in
80 severalty, according to such allotments, and that they execute mutual conveyances to each other of such respective shares, according to their respective interests therein, and if the parties differ about the number of commissions or any other matter relating to the issuing of such commissions, B. J. Shipman, Esq., master of chancery, is hereby appointed to settle the same between them, and said conveyances are also to be settled by the said master in case the parties differ about the same.

And it is further ordered that all deeds and writings relating to the said real estate in the custody or power of any of the parties be produced before the commissioners upon oath as they shall require.

And it is further ordered that the commissioners be at liberty to examine witnesses upon oath, and to take the depositions in writing and return the same with the commission; and whereas the defendant has prayed an appeal to the Supreme Court of the United States from this decree, such appeal is hereby ordered and allowed in open court, and it is ordered that said appeal operate as a super-

sedeas on the filing of a bond by or on behalf of the defendant in the sum of one thousand dollars, to be approved by the circuit judge of this court.

Liberty to apply.

DAVID J. BREWER,
Circuit Judge.

Defendant consents to the within form of decree.

DAN. W. LAWLER, *For Def't.*

St. Paul, Aug. 30th, 1888.

80¼ And afterwards, to wit, on the 14th day of Nov., 1888, the following bond and order allowing same was filed in this cause in the words and figures following, viz:

Bond.

Know all men by these presents that we, David J. Hennessy, as principal, and D. A. Montfort and A. S. Cowley, as sureties, are held and firmly bound unto George V. Bacon and Edward G. Rogers in the full and just sum of one thousand dollars, to be paid to the said George V. Bacon and Edward G. Rogers, their executors, heirs, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our executors, heirs, administrators, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a term of the circuit court of the United States for the district of Minnesota, in a suit depending in said court between George V. Bacon and Edward G. Rogers, complainants, and David J. Hennessy, defendant, a final decree was rendered against the said defendant, and the said defendant having prayed and been allowed and having taken in open court an appeal to the Supreme Court of the United States from said final decree in said suit:

Now, the condition of the above obligation is such that if the said defendant and appellant shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

DAVID J. HENNESSY. [SEAL.]
D. A. MONTFORT. [SEAL.]
A. S. COWLEY. [SEAL.]

Signed and sealed in presence of—
THOMAS F. MARTIN.
GENIO S. GEORGE.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 10th day of November, A. D. 1888, before me personally appeared David J. Hennessy and D. A. Montfort and A. S. Cowley,

to me known to be the persons described in and who executed the foregoing instrument, and each then and there acknowledged that he executed the same as his free act and deed

THOMAS F. MARTIN,
Notary Public, Ramsey County, Minnesota. [SEAL.]

STATE OF MINNESOTA, } ss:
County of Ramsey, }

D. A. Montfort and A. S. Cowley, being first duly sworn, says each for himself that he is a resident and freeholder of the State of Minnesota; that he is one of the sureties named in the foregoing bond, and that he is worth the sum of $2,000 over and above his debts and liabilities and exclusive of his property exempt from execution.

D. A. MONTFORT.
A. S. COWLEY.

80½ Subscribed and sworn to before me this 10th day of Nov., A. D. 1888.

[SEAL OF N. P.]

THOMAS F. MARTIN,
Notary Public, Ramsey County, Minn.

The above bond is hereby approved, and it is hereby ordered that the appeal referred to and said bond shall operate as a supersedeas, and that all proceedings of complainants upon the final decree from which appeal is taken, as recited in said bond, be, and they are hereby, stayed pending said appeal.

R. R. NELSON,
One of the Circuit Judges.

Dated Nov. 13th, 1888.

Endorsed: Service by copy of within bond, allowance, and order of supersedeas admitted this 13th day of November, A. D. 1888. Rogers, Hadley & Selmes, complainant's solicitors. Filed Nov. 14th, 1888. Oscar B. Hillis, clerk.

81 THURSDAY, *Oct. 27th*, 1887.

The parties met at the office of Mr. H. C. McCartey, and the following evidence was introduced on behalf of the plaintiff:

(10 O'CLOCK A. M.)

It is admitted that the real estate described in the complaint in this action, referred to by defendant in his answer, and on account of which partition is asked, is vacant and unoccupied land.

Plaintiff thereupon offered in evidence a certain deed, dated March 18, 1886, between David J. Hennessey (single), party of the first part, and Edward G. Rogers, party of the second part, conveying to said Rogers an undivided one-half of the lands in dispute, executed by David J. Hennessey, with two witnesses, and acknowledged an the 19th day of March, 1886.

Also warranty deed from Geo. N. Chittendon & Elizabeth Chittendon, his wife, parties of the first part, to Edward G. Rogers, party of the second part—consideration, $4,600—a conveyance to said Rogers of all of the lands in dispute, executed by Geo. N. Chittendon and Elizabeth Chittendon, his wife, with two witnesses, filed on the 20th day of Oct., 1885, at 2 p. m., Book 15 of Deeds, page 45.

The deeds are marked respectively Exhibits "A" & "B."

82 E. HADLEY, called as a witness on behalf of the plaintiff, being first duly sworn, testifies:

Direct examination by Judge LUSK:

Q. Where do you reside?

A. In St. Paul.

Q. What is your business?

A. Attorney-at-law.

Q. Are you a partner of Mr. Rogers, one of the plaintiffs in this action?

A. I am.

Q. How long have you been a partner of Mr. Rogers?

A. About two years.

Q. In what capacity, if any, were you with him previous to that?

A. Clerk.

Q. For how long?

A. More than a year.

Q. Were you present at any time when Mr. Hennessey and Mr Rogers made a settlement in regard to their respective claims on the land in dispute in this action?

A. I was not present when Mr. Hennessey and Mr. Rogers made the settlement, but I closed the settlement with Mr. Hennessey for Mr. Rogers in his absence.

Q. Did you see the written agreement that was made?

A. I did.

Q. Did you read it?

A. I did.

Q. What, if anything, was said or agreed upon between them in relation to a certain $100 that Mr. Hennessey had paid to Mr. Bacon on account of this land?

Mr. MCCARTEY: Is it supposed by that question that you ask what was in the written agreement?

Judge LUSK: No; the preliminary agreement.

Mr. MCCARTEY: The witness states he was not present at
83 the time of the settlement or understanding.

A. The understanding was at the time the deeds were passed that the $100 which he paid to Mr. Bacon was deducted from the amount which Mr. Hennessey was to pay Mr. Rogers.

Q. What amount did that leave?

A. I think it was $2,750.

Q. Deducted from what sum?

A. $2,850, the amount that was to be paid to Mr. Rogers by Mr.

Hennessey, and the understanding was that Mr. Rogers was to look to Mr. Bacon for this $100—practically an assignment of that claim, although not a written assignment.

Q. Did you see the deed that was executed by Hennessey to Rogers?

A. I did.

Q. Do you know positively the fact to be that the consideration was $2,850?

A. I do.

Q. And that the $100 was deducted?

A. I do.

Q. And that he only paid Rogers $2,750?

A. I do. The check was given to me at that time. The deeds were passed at that time. Mr. Rogers was away in California.

Q. Do you recollect the substance of that agreement so you could give it in full?

A. I know Mr. Hennessey was to have a deed of one-half of the land.

Q. That was contained in the written settlement?

A. Yes; he was to give Mr. Rogers a quitclaim to one-half and Mr. Rogers was to put certain papers he had upon record at that time, and Mr. Hennessey was to release Mr. Bacon and Mr. Chittendon from all claims he had against them.

Q. Which Chittendon?

A. Geo. N.

84 Q. These stipulations were laid down in that written settlement?

A. Yes.

Q. Was that signed by them both?

A. It was.

Q. And left in Mr. O'Brien's possession?

A. Left in Mr. O'Brien office at the time the settlement was completed.

Q. State whether the writing specified or not that this was in full settlement of their respective claims.

A. Yes.

—. Of all kinds and descriptions?

A. Yes.

Cross-examination by Mr. McCARTEY:

Q. You were not present, as I understand you, at the time the settlement was made between Mr. Rogers and Mr. Hennessey?

A. Not at the time they agreed upon it in the first place.

Q. And not present at the time the writing was drawn?

A. No; not at the first writing.

Q. Heard no talk between them as to what the terms of the settlement were?

A. No.

Q. Then all that you know about it was what took place between you and Mr. Hennessey at the time the deeds were passed and the money paid?

A. The conversation I had with M. Hennessey at that time.

Q. The terms, then, had been fully settled between them before that, and your only voice in the matter was to pass the deeds and receive the money?

A. That was all

Q. Where was this done?

A. In Mr. O'Brien office.

Q. Who was present at that time?

A. Mr. O'Brien was there in the office.

85 Q. Mr. John O'Brien?

A. Mr. John O'Brien was present, but I don't think he paid much attention. The transaction was between Mr. Hennessey and myself.

Q. The deeds had been drawn before that time?

A. They had been drawn and executed.

Q. But were passed at that time?

A. Yes.

Q. Mr. Rogers was in California?

A. Yes; I think so.

Q. And had signed the deed?

A. Yes.

Q. Mr. Hennessey had the deeds drawn and brought there prepared to pass?

A. Yes, sir.

Q. And at that time gave you the check for $2,750, which was the consideration mentioned in the deed from Rogers to Hennessey?

A. He gave me the check. I wouldn't say it was the consideration mentioned in the deed.

Q. You don't remember what the consideration was?

A. As I remember it now, it was $2,850. He gave me one hundred dollars less than the consideration mentioned in the deed.

Q. Then you think the consideration of the deed was $2,850?

A. Yes.

Q. And that he gave the check for $100 less than the consideration mentioned?

A. Yes, sir.

Q. Is that what leads you to believe the $100 held by Mr. Bacon was deducted from the consideration in the deed?

A. No; because that was the understanding between the parties at that time.

Q. The understanding between the parties, not from the conversation you had?

A. The conversation I had with Mr. Hennessy at the time.

86 Q. The contract in writing by which this matter had been settled had been drawn before this time?

A. Yes, sir.

Q. The contract had been left with Mr. O'Brien and that agreement they made between them you know nothing about except what you knew from that contract?

A. I remember talking about it; that is all.

Q. You wasn't present when the contract was made?

A. No.

Q. And you was also absent when the deeds were agreed upon as to how they should be drawn up? You was there merely to receive the money due? The deed was passed and the money paid and the matter closed up?

A. Yes; that was the understanding at the time.

Q. You don't remember whether it was mentioned in the contract in writing before you when the matter was closed up?

A. I think it was. I wouldn't be sure. I might say I think that the written agreement provided for the payment of $2,850, and the fact that the check was only for $2,750 naturally caused me to ask for an explanation of the difference between the two.

Q. What explanation did Mr. Hennessey give you in regard to that?

A. That he had paid Mr. Bacon this $100, and that Mr. Rogers was to look to Mr. Bacon for this $100; that that was the agreement between them.

Redirect examination:

Q. I believe you stated that you read this agreement between Rogers and Hennessey that was left with Mr. O'Brien?

A. Yes.

EMERSON HEADLEY.

87 E. S. CHITTENDON, recalled on behalf of the plaintiffs, testified as follows:

Direct examination by Judge LUSK:

Q. You have been a witness in this case?

—. ——.

Q. You have been a witness in this case on behalf of defendant?

A. Yes, sir.

Q. You are the same person who testified on the stand before that you were attorney of Geo. N. Chittendon?

A. Yes, sir; in respect to that transaction.

Q. And that business and all of it was done through you as his attorney and agent?

A. Yes, sir.

Q. Now, did you write to defendant Hennessey urging him to come up and close up the matter and take his deed and pay the money?

Objected to as immaterial and incompetent; not the best evidence. The contents of the writing cannot be proved in that way.

A. I find, by looking at my letter books, that I did write three letters.

Q. Have you your letter book here?

A. Yes, sir.

Q. Will you please state the date of the first letter, of which you have a copy, which you wrote to Mr. Hennessey?

Objected to as incompetent, not the best evidence, immaterial, and irrelevant.

A. Oct. 25th, 1882.

Q. You have not got the originals in your possession, have you?

A. No, sir.

88 Q. But you have got letter-press copies?

A. Yes, sir; taken at the time.

Q. These letter-press copies, of course, are exact?

A. Yes, sir.

Plaintiffs' counsel thereupon requested defendant's counsel to produce the original letters.

Defendant's counsel replies that he is not in possession of the originals and knows nothing about them.

The letter-press copy was then read in evidence of letter of Oct. 25, def't not objecting to the taking down of the letter from the copy instead of tearing it from the book to offer that, but does object that the letter-press copy is not the best evidence, and that it is incompetent and immaterial.

"Oct. 5, '2 (meaning '82).

D. J. Hennessey, Esq., Dubuque, Ia.

DEAR SIR: I have waited (somewhat impatiently) for your return to St. Paul for the purpose of getting to some understanding about the Chittendon purchase. Unless you are to return immediately please designate some person or attorney whom I can see about it, and oblige,

Yours respectfully, E. S. CHITTENDON."

89 Q. You stated that you wrote again on the same subject?

A. Yes, sir.

Q. Please read the letter-press copy of that letter.

Objected to as incompetent, immaterial, not the best evidence, — irrelevant, no objection to its being read instead of tearing it out.

Q. What is the date of that letter?

A. Undoubtedly Nov. 6, 1882.

Q. State how you are certain that it is of that date.

A. It is copied between two letters of the same date.

(Copy of letter.)

"DEAR SIR: I hope you will lose no time in getting to some understanding about the Chittenden purchase. Unless some understanding is reached very soon I shall return the deed to Mr. C., and he will probably decline to carry out the sale.

Yours respectfully, E. S. CHITTENDON."

Q. Have you also another letter?

A. Yes, sir.

Q. Please read that.

Same objection—immaterial, irrelevant, incompetent.

Q. Please read that.

A. This is dated Nov. 16, '2 (meaning '82).

D. J. Hennessey, Esq., St. Paul, Minn.

DEAR SIR: Yours of 15th inst. received in answer to a previous letter. You instructed me to see Mr. Horn. I immediately saw him and satisfied him as to some of the objections, consulted
90 him as to others, and left the papers with him. He expressed the wish to see you about the matter in order that he might inform me directly and positively what further would be required to make the title good. I have sought in every way since you went into this transaction to obtain an interview with you or some one authorized to act for you in order to arrive at something definite, and have found it exceedingly difficult to do so. Although instructed to refer me to Mr. Horn, Mr. Kavanagh did not do so until I wrote you, and now that I have interviewed Mr. Horn I find it difficult to reach any result. I am not accustomed to that way of doing business, and cannot say I particularly appreciate it. I would suggest that the best and quickest way to come to some definite understanding about the matter is for you to meet Mr. Horn and myself at such early time as may be designated by you. Unless this is done by Monday next (Nov. 20) I shall return the deed (which I hold ready for delivery to you) to Mr. Crittendon, and it is doubtful whether he will carry out the same. Allow me to suggest it is part of your manifest duty not to interpose interminable delays to the settlement of the matter, and that if you will appoint the above meeting or designate Mr. Horn or some other person who can act for you in your absence this transaction can speedily be finished.

Respectfully yours, E. S. CHITTENDON.

91 Q. Do you know he got those letters by his replying at all?

Objected to as immaterial.

A. I haven't looked up his letters, but I see by mine that there was a reply to one.

Q. Simply the fact whether you know from circumstances that he received them. You mailed them?

A. Yes.

Q. Whereabouts?

A. In the ordinary course of business.

Q. In envelopes that were stamped?

A. Yes.

Q. Were those envelopes marked to be returned to you if not delivered?

A. They were. All my envelopes were so marked.

Q. Were any of them ever returned to you?

A. I cannot say positively they were not, but I think I should have remembered if they had been.

Q. Is there any other letter?

A. No.

Q. Since you were on the stand before have you any better recollection in regard to whether the first deed was returned to Geo. N. Chittendon? He states in his deposition it was.

A. I cannot say anything further than before—that it is my opinion it was.

Q. That is your best recollection?

A. My best recollection. I think I covered that before.

Q. After you had held it about how long?

A. It was held three years or thereabouts.

Q. Do you recollect what actual consideration was paid by Mr. Rogers for the land?

A. On the 29th of Sept., 1885, I received from Mr. Rogers
92 $4,705.87 as consideration for the delivery of the deed to him.

Q. That was the consideration for this land, was it?

A. Yes, sir.

Q. Paid by Mr. Rogers?

A. By Mr. Rogers to me for Geo. N. Chittendon.

Q. As near as you can recollect, when did you finally get the deed from Geo. N. Chittendon and deliver it to Mr. Rogers?

A. The deed to Mr. Rogers himself?

Q. Yes.

A. Just about that time—within a day or two, I think, of the time. I know it was settled up very soon after the deed was received.

Q. Refresh your memory a little.

A. That is my recollection. I couldn't say positively.

Q. Didn't it take considerable time after you were paid the consideration before you were ready to deliver the deed on account of Geo. N. Chittendon requiring a bond—something of that kind—so that the deed was not delivered until along about the fore part of Nov.?

A. Really I don't remember holding the deed on account of that. I do remember that Mr. Chittendon required a bond of indemnity; that that was executed and delivered to me, probably; it must have been executed and delivered before I delivered the deed and received the consideration, although I don't remember the precise dates. I don't undertake to place the dates in the matter at all. I didn't bear them in mind; can't recall them with any definiteness, as I have said.

Cross-examination:

Q. Money was received by you before this deed from Geo. N. Chittendon to Edward G. Rogers was delivered?

93 A. It was received on the 29th of Sept. I think it was.

Q. At the time you received that money you didn't have the deed of Geo. N. Chittendon to Edw'd G. Rogers in your possession?

A. I couldn't say as to that. This is the second deed.

Q. You didn't have this deed running direct to Edward G. Rogers in your possession when you received the money? You had the Bacon deed in your possession then, hadn't you?

A. Yes; I probably had. I see this deed is dated the same time.

Q. The same time you received the money you drew the deed and dated it?

A. Yes, sir; that is doubtless the case.

Q. And delivered him the Bacon deed?

A. Yes.

Q. And he held that in his hands until this came around?

A. That was probably the case.

Q. In the meantime, before this was delivered, there were negotiations regarding the bond; the bond was executed by Mr. Rogers and delivered to you, and then you delivered Mr. Rogers this deed?

A. My recollection is that, as I requested the giving of the deed directly to Mr. Rogers, Mr. Chittendon wished to be indemnified, and the second deed—this deed—doubtless was not delivered to Mr. Rogers until the bond was executed.

Q. Mr. Chittendon, however, had expressed his willingness that the deed should be delivered to Mr. Rogers—that the title should pass—upon the payment of this money agreed upon, but he was not willing to make the deed direct to Mr. Rogers unless he was indemnified?

94 A. Not unless he was indemnified.

Q. Have you copies in this book that you made of letters you wrote to Mr. Chittendon in reference to the closing up of this matter?

Objected to on the same grounds as when witness was on the stand before; that the letters were communications between the attorney and his client and are not evidence in any way and are private besides.

A. I find only one copy of letter to him at this time, and I have the objection to producing it that it is private and it does not concern particularly this case. That is all.

Q. By referring to your copy of that letter in reference to the closing up of this matter that you wrote to Geo. N. Chittendon I suppose you will be able to refresh your recollection considerably as to the facts and circumstances under which the settlement was made and Bacon's connection with it?

A. Yes, sir.

Contents of the letter objected to in any way, shape, or manner.

Q. What is the date of that letter?

A. 24th of Jan., 1883.

Q. You don't find in that book the copy of any other letter which you wrote at the time you was closing this transaction by conveying the title to Mr. Rogers?

A. No; those were in another book. Yes; that transaction was two years or more later than this. It isn't subject to the same objection as the other letters, but as a matter of principle I don't want to produce it.

95 Q. All those letters contain personal matters which you think objectionable and throw no light on the transaction?

A. No; I don't say that.

Q. You made the objection to producing any of them because they contain personal matters.

A. My objection was a matter of principle that I don't think I have any right or should be compelled to produce here letters to my client not directly related to Mr. Hennessey, Mr. Bacon, and Mr. Rogers—a matter of correspondence with my client—and that same objection holds here. I object to any one of those letters as containing statements of his opinion on certain subjects.

Q. If those letters are already produced by Mr. Geo. N. Chittendon himself I suppose you would not object to testifying in regard to them?

A. Yes; I would let Mr. Geo. N. Chittendon hoe his own row.

Q. If those letters are already in evidence and contain any personal matters and are already here and contain statements different from your recollection of the transaction in your former testimony, by looking at those letters you would be able to change your testimony in some respects, wouldn't you?

A. I couldn't say until I had seen the letters.

Q. You have copies of all of them?

A. I have not read them all. My recollections of some of the details of this transaction, as I have said, are indefinite.

Q. By reading over some of those letters—reading a letter directly after Mr. Chittendon had made tender, in which you state to
96 Mr. Chittendon that Mr. Hennessey had been to you and made a tender of the money on that contract, and that Mr. Hennessey had an assignment of the contract and made tender in his own behalf as assignee of the Bacon contract—do you remember such a letter?

Objected to as incompetent and immaterial.

A. No; I don't remember the contents of the letter.

Q. You have a copy of the letter.

A. I have copies of all my correspondence.

The form of cross-examination objected to on the ground that it is no part of the direct examination of the witness and doesn't pertain to any of the direct testimony in any way, shape, or manner.

Mr. McCARTEY: Well, I don't care; let it go.

A. I wish to state, as counsel seems to wish to involve me in an apparent contradiction of my testimony here based on the recollection of the transaction, of course I can only give it as I recollect, and my letters were written at the time and possibly may show a different state of facts from what I now recollect.

Q. That is why I wanted to show you the letters. I thought you might possibly refresh your recollection on two or three points by them. Have you any of Mr. Hennessey's letters?

A. I suppose I have, whatever I received from him. I haven't looked.

Q. I wish you would produce any that you have.

EDWIN S. CHITTENDON.

Counsel for defendant offers in evidence copy of judgment in the case of D. J. Hennessey & others against Andrew M. Torbett,
97 in which David J. Hennessey & Edward G. Rogers & Geo. V. Bacon were plaintiffs, dated May 8, 1886, signed by the court.

Objected to as immaterial, irrelevant, & incompetent.
(Endorsed and filed May 8th, 1886.) Def't's Ex. C.

Adjournment taken till Oct. 28, 10 o'clock a. m., at which time parties met, but, not being ready with further evidence, adjourned till Oct. 31, '86, at 10 o'clock a. m., at which time adjournment was taken till Nov. 6, 2 p. m.

Nov. 6TH, 1887—2 p. m.

Parties met at the office of H. C. McCartney, pursuant to stipulation.

E. G. ROGERS, one of the plaintiffs, being first duly sworn on behalf of plaintiffs, testified as follows:

Direct examination by Judge LUSK:

Q. You are one of the plaintiffs, are you not?
A. I am.
Q. You are by profession a lawyer?
A. Yes.
Q. Been engaged in practicing law how long?
A. For myself about eighteen years. I was admitted to the bar about twenty years ago; was clerk in a law office.
Q. How long have you been a resident of St. Paul?
A. 21 years the 23d of this month.
Q. Are you acquainted with Mr. Hennessey, the defendant in this suit?
A. Yes; I am.
Q. How long have you known Mr. Hennessey?
A. My impression is I became acquainted with him some
98 time in '80 or '81—not intimately, though—a speaking acquaintance.
Q. Mr. Hennessey, in his testimony in this case, stated that he had received a letter from you some time in the fall of 1885 in which you claimed to have a legal title to this land in dispute and demanded of him that he quitclaim to you certain contracts that he appeared to be interested in, which were a cloud on your title. Did you send him such a letter?
A. I recollect writing a letter to him at Dubuque, Ia., in Dec., 1885.
Q. Have you a letter-press copy of that letter of Dec. 16th, 1885, which you wrote?
A. Yes.
Q. Is it a fac-simile?
A. Yes. It is the same letter that Mr. Hennessey testified to having received about that time.

The letter-press copy was offered in evidence and read to the notary so as to save tearing it out of the book:

DEC. 16, 1885.

Mr. J. D. Hennessey.

DEAR SIR: Mr. Geo. V. Bacon, of this city, having forfeited and defaulted in his contract for the purchase of the Geo. N. Chittendon land, situated in Washington Co., in this State, and described as follows: (Here follows description.)

I have purchased the same from Mr. Chittendon and have my deed on record. Mr. Bacon seems to have assigned his contract to you, and the assignment from him stands on record. This
99 makes an apparent cloud on my title which I desire to remove.

Rather than be at the expense of a lawsuit, I would be willing to pay you a nominal sum for a quitclaim deed. Mr. Bacon, I suppose, is good for the amount advanced by you. Let me hear at once from you, because if this matter cannot be arranged I shall be obliged at once to bring suit.

Yours truly, EDW'D G. ROGERS.

Q. Did you receive any answer to that letter?
A. No.
Q. Did you write him again on the subject?
A. Yes; I wrote another letter—one on Jan. 21, 1886, at St. Paul.

Letter-press copy of letter of Jan. 20, 1886, offered in evidence:

Mr. D. J. Hennessey.

DEAR SIR: Should I not hear from you in a day or so I shall take it for granted you don't desire to meet me to talk over the Washington Co. land matter, and I shall govern myself accordingly. While I am not particularly anxious to incur the annoyance of a lawsuit, I feel quite confident of my position in the matter in any event, and intend to find out, with the utmost diligence, who is the owner of that property.

Yours truly, EDW'D G. ROGERS.

Q. (Handing letter to witness.) Is that an answer to your letter?
A. Yes; that is the answer.

Letter dated Jan. 21, 1886, is offered and read in evidence:

Edw'd G. Rogers, Esq.

DEAR SIR: I am in receipt of your favor of the 20th inst.,
100 & in reply would say that while I am fully assured of the validity of my right and title in and to the lands referred to and prepared to defend that right & title to the utmost, if need be, I am nevertheless, in the interests of peace and for the sake of avoiding what may prove a long, vexatious, and expensive litigation, to say nothing of the bitterness of feeling usually resulting from such things, *am* willing to meet you and see if some amicable adjustment of the question that has arisen cannot be reached. I wish it, however, distinctly understood that I do not, by this conces-

sion to peace and harmony or good feeling or anything that may result therefrom in any way, shape, or manner, waive any right or recognize or admit in you or in any one else any right, title, or interest, legal or otherwise, in or to the lands in question or any part thereof, and that I emphatically must oppose and in the strongest terms, forever, any such right, title, and interest in you and any and every existing person.

With that understanding I shall endeavor to meet you for this purpose in the course of the coming week at such time and place as we may hereafter agree upon. At present my time and attention are too much engrossed with other and urgent matter, and I am feeling withal so ill that I cannot possibly agree to meet you sooner.

If this prove satisfactory you may so signify and I shall see or communicate with you as early as convenient.

Yours truly, D. J. HENNESSEY.

Q. Did you write to him again on the 26th of Jan., 1886?

A. Yes; I did. It is in that letter book.

101 Q. Is that a fac-simile of that letter?

A. Yes: a letter-press copy.

Letter offered in evidence. It reads as follows:

ST. PAUL, *Jan.* 26, 1886.

D. J. Hennessey, Esq.

DEAR SIR: Yours of the 23rd inst. at hand and contents observed. Let me know when you can see me and talk the matter over and I will be on hand.

Yours, EDW'D G. ROGERS.

Again:

ST. PAUL, *Febr.* 4, 1886.

D. J. Hennessey.

DEAR SIR: As a matter of compromise, I have concluded to offer you a thousand dollars for a quitclaim of your interest in the Washington county land; should have written before, but have been busy. Let me hear from you soon.

Yours respectfully, EDW'D G. ROGERS.

Again:

ST. PAUL, *Febr.* 11, 1886.

D. J. Hennessey.

DEAR SIR: Will you please let me know from you about the Washington Co. land? I want to bring this matter to a conclusion at once.

Yours truly, EDW'D G. ROGERS.

102 Again, between Febr. 20, 1886, and Febr. 22, 1886:

D. J. Hennessey.

DEAR SIR: I have not heard from you in response to my offer for that Washington Co. land. If you have any proposition to make or

intend to make one please let me know, so that I may be governed accordingly. I shall expect to hear from you right away.

Yours, &c., EDW'D G. ROGERS.

Q. Just state in your own language and in detail the personal interviews that you had with Mr. Hennessey from the time of writing that first letter that we have offered in evidence up to the time of the first settlement.

A. I first met Mr. Hennessey after I had purchased this land from Geo. N. Chittendon, I think, as he states, some time about the last of Dec., '85, or it might have been the 1st of Jan., '86, after I had written him this letter at Dubuque, to which he made no answer. We had some conversation. I met him on the street down in front of the Merchants' Hotel, and had some conversation that didn't amount to anything. I don't recollect what it was, but I think the first interview I had with Mr. Hennessey in relation to this land was when he came into my office (a personal interview) with Mr. McCartey in response to some of those solicitations or letters that I had written him for an interview to talk the matter over, and it was after he had written me that letter of Jan. 22 he said that Mr. McCartey came in simply as a friend, not as an attorney in the matter at all, and we three talked the matter over a good deal, as Mr. Hennessey says. He claimed he was the owner of the land, and
103 I claimed that I was the owner of the land. That was about the sum and substance of it. We had a good deal of talk back and forth. That was about the amount of it.

Q. Did he or did he not in that conversation deny your having any right to the land?

A. Yes, sir; he always insisted I had no right to the land—took the same position in all the conversations that he did in his letter, that any claim I had was simply a cloud on his title.

Q. What did you claim?

A. I claimed that I had the title, that I was the owner of the land, and I also stated in some of these conversations, I don't know exactly when, as to the 40 acres I got through the Sanborn purchase, which of course he knew. As to the power of attorney, if there was any at all, it had never been put on record; apparently I had the title to the 40 acres anyway; if any power of attorney had been made it wasn't on record, couldn't be found, so of course it appeared that I was the owner of that 40.

Q. But at this time you had the title to the whole?

A. Yes, but outside of that.

Q. Pass right on to any other conversations you had with him previous to the settlement up to the time when you came together and made the settlement.

A. That didn't result in anything. I don't know whether Mr. McCartey and Hennessey and I met again, but I think we did not. The next time I had any talk with Hennessey about it was right in front of the German-American Bank building. It was the same at which he and Mr. Bacon had that fuss—whatever it was—
104 scrimmage. That didn't result in any deal; in fact, we didn't

talk over this matter any, because the skirmish came up, and of course we separated.

Q. State the substance of that conversation between Bacon and Hennessey—hard words, resulting in——

A. Resulting in nothing, but Mr. Hennessey followed us up. We started to go up to the club and he came up after us, and I told him it wasn't best to have any more trouble in this matter with Bacon; that if he wanted to talk this matter over with me he could come to my office, and he came next day or the day after, and I talked it over with him and finally settled.

Q. Who was present at the final settlement?

A. Mr. Hennessey and myself and I think another young man by the name of Martin; that was before drawing off the writing; I think that was the 17th of March. I was going to California; was thinking of starting on the 19th of March. Well, we had some wrangle—we always had—he claiming to be the owner and I claiming to be the owner of the property. We finally settled down on this proposition: Mr. Hennessey was to pay me $2,750 in cash and make an assignment—transfer to me the $100 he had paid Bacon on the contract, and he was to give me a quitclaim deed to an undivided one-half of the land, and I was to quitclaim to him an undivided half of the land. I was to bring suit to set aside this Sanborn mortgage—the Cressey mortgage referred to here—the mortgage from Cressey to Moore—without cost to Hennessey, and I was to give him all these papers I had from Sanborn, and he was to put them on record.

Q. What, if any conversation previous to the written settlement did you have with him in reference to the Sanborn
105 interest you purchased?

A. I told him I had paid Mr. Sanborn $1,000 for those papers—for his interest in this land—his right to that mortgage. I deny absolutely that I ever based any claim to title by reason of any mortgage, but of course I insisted and he of course saw that I was the owner of that 40 acres. The records showed just exactly how it stood.

Q. When you made that settlement you gave Mr. Hennessey all these papers to put on record?

A. Not at that time.

Q. After you had drawn the written agreement?

A. Yes.

Q. What, if anything, did you say to Mr. Hennessey in any of your conversations previous to the time of that written settlement in regard to Mr. Bacon owning any interest in this land?

A. Never said anything about it except to say I claimed to be the owner of that land. That was the basis I wished the settlement on, that I claimed to be the owner of the land.

Q. How much up to the time of making that written settlement had you paid out for that land?

Objected to as incompetent, immaterial, and irrelevant.

A. I paid for that land to Mr. Chittendon—E. S. Chittendon—as

agent for Geo. N. Chittendon, $4,705.87, the 29th of Sept., 1885, by a check on the Merchants' Nat'l Bank of St. Paul; paid Mr. Sanborn on the 30th day of Sept., 1885, for his interests, whatever they were, check on the Merchants' Nat'l Bank for $1,000.

Q. Whose money was that?

106 A. My money; every dollar of it. Nobody else had any interest in it in any way, shape, or manner.

Q. Paid out for yourself?

A. Yes, sir; paid it out for myself.

Q. That is in that land to this day?

A. Except what I got back from Hennessey, and I got back something else—part of the costs and expenses.

Q. But the principal?

A. The principal remained in the land, except what I got back from Hennessey. In other words, if Hennessey wins this suit that money should all come back to me.

Q. Nobody else has any interest?

A. Nobody else in any way, shape, or manner. After we had that conversation in Hennesey's office, I think on the 17th of March, we agreed to draw up an agreement that John D. O'Brien should draw the contract of settlement, and we went over on the following day—the 18th of March, 1886—to Mr. John D. O'Brien's office. Mr. O'Brien was busy and we sat around waiting for an hour or so for him to draw up the contract, and then I said to Mr. Hennessey, I will draw the contract. I don't want to wait any longer. He said, "All right; you draw the contract." So I sat down and drew the contract and he signed it and left it with Mr. O'Brien in escrow and he went off, and I went to my office and didn't see him again till I got back from California.

Q. Before he signed that agreement he read it?

A. Yes; he read it or I read it to him.

Q. Repeat that contract as fully as you can, carefully. Go slow and give it substantially as it was written.

107 A. The contract started out like this: "Whereas Edward G. Rogers claims to be the owner of the following-described property (description); and whereas David J. Hennessey claims to be the owner (or D. J. Hennessey claims to be the owner) of the same land (descr.): Now, therefore, to settle all matters of dispute between the said Rogers and the said Hennessey in relation to this land (I don't know but Hennessey's name may have been before mine) it is hereby agreed that the said Hennessey pay the said Rogers the sum of $2,850 and execute and deliver to him a quitclaim deed to an undivided one-half of that land, and that Edward G. Rogers shall execute and deliver to David J. Hennessey a quitclaim deed to an undivided one-half of this land; and it is further agreed that this settlement shall be full and complete and final settlement of all claims in favor of David J. Hennessey as against Geo. V. Bacon and against Geo. N. Chittendon." Mr. Hennessey stopped there and says——

Q. Just repeat the agreement as near as you can.

A. That is substantially the agreement as I drew it, and there

was a little correction I want to state. Mr. Hennessey didn't want to sign the contract discharging Mr. Bacon from all claims of any nature—objected to releasing him from all claims of any nature. He agreed to it in regard to any dispute about this land; that was all right, but there was this personal altercation that I suppose he referred to.

Q. That contract was signed by you both?

A. It was signed by us both. I delivered it to Mr. O'Brien with the understanding that the money should be paid to Mr. O'Brien and the deeds sent by Mr. O'Brien to each party.

108 Q. As I understand, Mr. Hadley, you wasn't present when Mr. Hennessey gave his check.

A. Yes; I had gone to California.

Q. And he brought in a check for $2,750, while this written agreement read $2,850, and Mr. Hadley called his attention to it? Will you please explain the difference between the written agreement being for $2,850 and the check for $2,750.

A. At the time I had the talk in Hennessey's office, before we went over to draw this agreement, it was understood he was to pay me $2,850, but that $100 of that—to make that up—should be the assignment of that $100 on the contract. He offered to give me a written assignment and I said, No; I am satisfied with a verbal assignment. That is exactly the way that $2,850 was made up. The- there were other things done at O'Brien's office.

Q. Go right ahead and tell them.

109 A. I had the papers that Sanborn had given me in my pocket and I handed them to Mr. Hennessey. The agreement was that Mr. Hennessey should put those papers on record—the satisfaction of mortgages and deeds. I was to pay half the costs of putting them on record and he was to pay the other half. He was to get the taxes on that property, and I was to pay half and he half, and bring in the bill and his check to Mr. O'Brien. I was to pay half the amount, and then I was to bring this suit to satisfy the mortgage without any costs or expenses to him whatever.

Q. Did you bring that suit?

A. Yes.

Q. Go right along.

A. I then went on that trip. My wife was in Louisville at the time. Of course, there had to be a passing of deeds to get it closed up right, and, Mrs. Rogers being in Louisville, I couldn't give Hennessey this deed; but we were going to California, to start from Kansas City together, Mrs. Rogers and myself. I was to go by the way of Omaha and she by the way of St. Louis, and we were to meet at Kansas City, and I would have the deed drawn so that at Kansas City, between trains, she could sign it, but the time was so short at Kansas City that it wasn't executed there, but it was executed at Los Angeles immediately upon getting there, and I sent the deed to Mr. O'Brien, half the property deeded to Mr. Hennessey, and when I got home I found the money awaiting me.

Q. After you got back did you proceed to bring action to clear up the Sanborn mortgage?

A. I got back the 11th or 12th of April, 1868.

Q. Right there, in that connection, I want to ask you this question: You stated you had paid $1,000 to Sanborn?

110 A. Yes.

Q. Whose money was it?

Objected to as material.

A. My own.

Q. Paid for yourself?

A. Yes, sir. Nobody had a dollar's interest in that money in any way, shape, or manner.

Q. What did you do after you returned from California in regard to bringing action?

A. After my return from California (I could give you the exact date by referring to the complaint) I drew up a complaint brought by D. J. Hennessey, Edward G. Rogers, and G. V. Bacon against Torbitt. I took it to Mr. Hennessey at his office and said, Mr. Hennessey, I am now ready to bring this suit to settle the Cressy mortgage standing on this land. I have transferred one-quarter of this land to Geo. V. Bacon, and don't care to bring this suit for these three parties without bringing in the names of the parties involved, so if it meets your approval we will do it in this way. (He had already told me I could bring suit in his name to cancel the mortgage.) Mr. Hennessey said, "All right," and read over the complaint, and I brought suit and got the mortgage cancelled. At that time Mr. Hennessey said to me that he thought that the agreement we entered into ought to be recorded and it hadn't been acknowledged. It was in Mr. O'Brien's hands. I said I had no objections to its being recorded, and perhaps it was best, because it showed the exact settlement by us. Hennessey said that before it was recorded he would like to draw that agreement over himself, and perhaps make the verbiage in it a little better in shape. I said I had no objection; he could draw it over as he saw fit, and if it was substan-

111 tially the same contract I would sign it and have it recorded.

Under those representations I then gave him an order on John O'Brien for the contract, and Mr. Hennessey never showed it to me again. That contract has never been filed, but I know we carried out the contract under the agreement. He claims he has lost it. The reason I am particular about this is that at the time of settlement it was understood that this contract, when completed by the delivery of the deeds and payment of the money, should be given to Geo. V. Bacon as evidence that everything was settled as against him concerning this land.

Q. Why were you so particular to have the release issued to Bacon?

A. Because I had executed a $10,000 bond to Geo. N. Chittendon to hold him clear and harmless from any claim of Geo. V. Bacon on D. J. Hennessey or John B. Sanborn—put the whole three of them in.

Q. Hennessey says this permission given for action did not refer to the Sanborn mortgage.

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Q. Hennessey says this permission given for action did not refer to the Sanborn mortgage.

A. We never talked of any other mortgage in any way, shape, or manner. There were four other mortgages for $100 each. I didn't know where the parties lived; never heard of them. Mr. Hennessey knew as well as I did about the mortgages.

Q. This action was about the one mortgage?

A. Never talked about any other mortgage in any way, shape, or manner.

Q. That is the action in which a decree has been introduced in evidence?

A. Yes.

Q. You sold Mr. Bacon a quarter interest you had remaining in the land. What was the consideration for this sale to Bacon?

112 A. That was the second quarter. Mr. Bacon and I owned what is called G. V. Bacon's Addition to St. Paul, on which there was a mortgage for $27,000, drawing 8%. I bought Mr. Bacon's half of that property, agreeing to assume the mortgage and pay Mr. Bacon $17,500. $7,500 was paid in cash; $10,000 to be a quarter interest in this land in dispute. Mr. Bacon executed and gave me a deed to his undivided one-half of G. V. Bacon's Addition to St. Paul, subject to the mortgage. I gave him $7,500 in cash and a warranty deed for the undivided one-quarter of this property. After that suit was brought and Hennessey had put in his answer, in which he claimed there was fraud in the settlement between him and me, Bacon said to me, "This is not what I bought." I said to Mr. Bacon, "You did buy this property."

Objected to as immaterial and irrelevant.

I said, "Yes; you did buy this property."

Objected to as immaterial, irrelevant, & hearsay.

I bought this land—this undivided $\frac{1}{4}$—back from Mr. Bacon for $2,000 cash and $8,000 in notes, secured by a mortgage executed by Chas. P. Coleman to me in part payment for the property I sold him. I guaranteed collection of those notes.

Q. Before this suit was brought what, if anything, did you ever at any time say to Mr. Hennessey in regard to Bacon's interest in the property?

A. Never spoke to him about it in any way, shape, or manner.

Q. Were you present at the time when Hennessey says they had the talk?

A. I was. I heard Mr. Bacon say something about a hundred dollars. I didn't care anything about it, and I am not very

113 clear about what was said. They were talking together.

Cross-examination:

Q. How long have you been acquainted with Mr. Bacon?

A. Well, sir, I have been acquainted with him ever since 1881, I think; perhaps a little earlier than that. I won't be sure about that; not intimately, however, until long about 1884 and '5.

Q. Done business for him as an attorney?

A. Well, yes, sir.

Q. How long since you commenced to act as his attorney and do business for him?

A. I guess I had some law business for him before 1885. I never had a great deal. Most of my business for Mr. Bacon has been with the firm of Rogers & Hadley, and Mr. Hadley has done it.

Q. When did you commence to do any law business for him?

A. I couldn't tell you. I might have done some in 1884. I don't think I did. I think it has all been the last two years—I think the last two years—with Rogers & Hadley.

Q. When did you commence to examine abstracts for him?

A. I never did examine abstracts for him.

Q. When you say you became intimately acquainted with him, when was that?

A. The first business I had with him he bought an interest in 40 acres of land I owned out here, and I was very sorry he did. That was in 1883.

Q. Then you and he have been jointly interested in some property or others, real property, since 1883?

A. Yes; I think 1883.

114 Q. You became pretty intimately acquainted with him about that time?

A. I had some opportunity.

Q. Just answer the question.

—. Mr. Bacon and I have been intimate friends for some time and have had a great many land deals together. That is a broad answer and will cover all you can ask.

Q. When did you begin to negotiate for this property in question?

A. In 1885.

Q. Who called your attention to it?

A. Mr. Bacon.

Q. Did he consult with you in regard to his interest in it?

A. He did not.

Q. After he called your attention to it whom did you negotiate with?

A. As to this property?

Q. Yes; the property in question.

A. As to the purchase of it nobody but Geo. N. Chittendon, through E. S. Chittendon, his agent.

Q. Your negotiations with Geo. N. Chittendon were through E. S. Chittendon?

A. Yes.

Q. You had no personal communications or letter communications with Geo. N. Chittendon direct?

A. I did not.

Q. When did you find out that Mr. Bacon had forfeited his interest in the contract with Geo. N. Chittendon?

A. I found that out—knew that—at the time I purchased of Geo. N. Chittendon himself.

Q. How did you know? How did you find out?

A. Geo. N. Chittendon gave me a warranty deed and I executed to him a bond.

115 Q. The forfeiture mentioned by you?

A. Yes.

Q. The forfeiture you mentioned in the bond you gave to Mr. Geo. N. Chittendon?

A. The forfeiture mentioned.

Q. How many talks did you have with E. S. Chittendon in reference to that matter?

A. I think I had two.

Q. Only two?

A. Before I purchased; yes.

Q. One final talk at the time of the purchase?

A. No, sir.

Q. There was only two talks on the transaction up to the time you paid the money?

A. Up to the time I paid the money I say that I had only two talks—up to the time I paid the $4,705.87.

Q. Did you go out and see the property?

A. I did not. I knew where it was.

Q. In what way did Mr. Bacon call your attention to that property?

A. I was in Mr. Bacon's office one day, some time in Sept., '85, and Mr. Bacon called my attention to that piece of property and told me and showed me that he had a contract with Geo. N. Chittendon and had assigned that contract to D. J. Hennessey. He showed me the contracts and told me that David Hennessey refused to take the property and had for three years continually refused to carry out the contract, either with him or with Mr. Chittendon. He wanted to know if I wanted to purchase that property. I told him to give me the papers and abstracts and I would look it over and see. He gave me the papers and abstracts and I looked them over and

116 saw that Jno. B. Sanborn had an interest in the property, and that his interest had been recorded.

Q. Did Bacon tell you anything about the Sanborn interest?

A. I don't know whether he told me or whether I found it out by examination of the records myself.

Q. You don't know whether he did?

A. I don't. It is quite likely that he did.

Q. Did you then go and see Sanborn and find out what you could purchase his interest for?

A. I don't know that I did that day. I did go and see him several times. I will state further that Mr. Bacon did not go with me. I went alone every time to see Mr. Sanborn.

Q. Did you get particulars from Mr. Bacon in regard to Sanborn's interest in the property or what he was likely to take for his interest?

A. I did not. Sanborn asked $2,500, but I finally obtained it for $1,000.

Q. Bacon didn't tell you anything about it?

A. He didn't tell me anything about that. He didn't know anything about that.

Q. It was not very long, then, after you had your first talk with Bacon before you closed that matter up and paid the money on the 29th day of Sept.?

A. Yes, sir.

Q. It was in the month of September these things occurred?

A. Yes.

Q. Had Bacon spoken of it before?

A. No, sir.

Q. He had never spoken a word in regard to it?

A. I don't say that. We had several talks about it.

Q. In the month of Sept.?

A. I can't say. It is barely possible. I might have heard
117 it at the time when Bacon bought this land. I knew Bacon and Hennessey had some deal, but didn't know any particulars—at least I had heard so. I got that impression, but don't know whether Bacon had told me so, or a clerk, or Hennessey.

Q. At the time you made this writing with Mr. Hennessey you delivered to Mr. Hennessey certain papers?

A. Yes, sir.

Q. Can you tell what papers they were?

A. I could if I had them here. I can tell you some of them from memory.

Q. Have you got the abstract here?

A. I think I can tell you the papers—the assignment of the mortgages—the Cressy mortgages.

Q. Assignment to whom?

A. Mr. Sanborn—that is, Sanborn had the assignment and he assigned to me. That assignment to the Sanborns had been on record a long time before I knew anything about the property, and Hennessey had as good an opportunity as I had to know about it.

Q. That assignment to Sanborn had been recorded before?

A. Yes, sir; a long time before.

Q. That was the one you gave to Hennessey?

A. No, sir; I didn't give him that. I gave him the assignment of Sanborn to me to be recorded.

Q. Did he take that assignment of Sanborn to you and put it on record?

A. He said he did; I don't know whether he did or not.

Q. That was the assignment of Sanborn to you which was recorded by Mr. Hennessey?

A. Yes; arranged that it should be.

118 Q. What were the other papers besides this assignment?

A. I gave him a quitclaim deed of all this 40 acres from Sanborn to me.

Q. Was that of record?

A. No, sir.

Q. You gave that to Hennessey to record?

A. Yes, sir.

Q. What else?

A. I gave him four patents, U. S. Government, to different parties for portions of this land.

Q. Yes; those have been put in evidence here. What others?

A. I gave him the satisfaction of another mortgage.

Q. Do you remember what mortgage that was?

A. No; I could tell if I had the papers. The mortgage isn't disputed. Everybody knew of it.

Q. That doesn't refer to the Cressy mortgage?

A. No, sir; it was a mortgage that everybody knew about, as I understood. Those constituted the seven papers.

Q. Those papers were delivered to him for the purpose of being recorded?

A. Yes, sir.

Q. You stated that those writings you made between you and Hennessey stated the consideration of $2,750?

A. $2,850.

Q. Are you perfectly clear it was $2,850 instead of $2,750, the writing stated?

A. I know that was the understanding, and I am very sure the contract so stated.

Q. You are quite sure it was in the contract, and that the contract embodied your understanding at that time?

A. Yes, sir; I knew it was the understanding to give me $2,850, as I have told you; no question of that at all.

119 Q. Do you know where the original Cressy mortgage was?

A. I had it.

Q. You didn't deliver that to Mr. Hennessey?

A. No; I did not; no use.

Q. That original Cressy mortgage was used as evidence in this action that you brought to quiet title?

A. It was; yes, sir.

Q. That is on file among the papers in that case?

A. Yes, sir.

Q. You had that in your possession, hadn't you, at the time you delivered these other papers to Mr. Hennessey?

A. I had, in my office.

Q. And afterwards used it when you brought the action to quiet title?

A. Yes.

Q. Used it in evidence?

A. Put it in evidence; yes; had it filed in court as part of the records—one of the facts.

Q. That contained a satisfaction, did it not?

A. It contained an assignment from Moore to Torbitt. I don't know whether there was a satisfaction by Torbitt or not. The point about that mortgage was just this, if you want to know——

Q. Well, never mind about that. About what time did you return from California?

A. The 11th day of April, 1886.

Q. And you think it was about three weeks after that that you brought your action?

A. Something like that; might have been a month.

Q. Something like that time after you brought an action to quiet title in which you used the names of yourself, Mr. Hennessey, and Mr. Bacon?

120 A. Yes, sir.

Q. At what time did you make this deed to Bacon of a quarter interest—this first deed from you to Bacon?

A. The same time I made the deed to Hennessey.

Q. What was the consideration of that deed?

A. The understanding Mr. Bacon and I had at the time I purchased the property from Chittendon—the consideration grew out of an understanding.

Q. Then you had an understanding at that time with him—at the time you purchased the property?

A. Yes, sir.

Q. You had an arrangement with him that you should deed a quarter of that property?

A. No.

Q. You did deed this to him in pursuance of that arrangement?

A. I did.

Q. And the consideration was $100?

A. That was the nominal consideration. It might just as well have been $500 or $200.

Q. Then, afterwards and before this suit was brought, you sold to him the other half for $10,000?

A. The other quarter—yes; I did.

Counsel for defendant asks permission to introduce further questions on cross-examination, if desired, after seeing defendant Hennessey, who was necessarily absent from the examination.

To which counsel for pl'ffs agrees.

Redirect examination:

Q. What was the trouble with the Sanborn mortgage? What was the claim of Sanborn and those who held it? What did they claim?

121 A. The mortgage ran to Timothy R. Cressy and his wife (mentioning her by name). I don't know what her name was. This assignment of this mortgage was simply assigned by Timothy R. Cressy; consequently Sanborn claimed his wife owned half as well as her husband, and on the records it appears she did, whether she did or not. She parted with her interest.

Q. That was the situation of the Cressy mortgage?

A. Yes; that was the situation, apparently. If the wife didn't have any interest it had been fixed up; if the wife did have any it had not been fixed up.

Q. I asked you if you ever said that was a valid mortgage. Didn't you?

A. I never did—to any living man—no time.

Q. You spoke of having an arrangement with Mr. Bacon by which you was to deed to him one-half or part of the land?

A. Yes, sir.

Q. Was that in writing?

A. No, sir; it was merely a verbal agreement.

Q. In case you got the land?

A. In case I got the land I was to give Mr. Bacon half of it. He was to pay half the costs and expenses, not this purchase-money at all; that had nothing to do with it.

Q. That was a mere verbal understanding?

A. A mere verbal arrangement.

Q. That was based on the idea of your getting the whole land?

A. If I got the whole land.

Q. Did you give him any writing?

A. No writing; never signed any document to that effect. I may state further that at the time I made the arrangement
122 with Mr. Bacon I had no idea—it never had been suggested to me that I ought to give a bond. I was absolved from any moral or legal obligation. I wouldn't have given a deed to anybody if there hadn't been an entire settlement of everything. I considered that morally I ought to do it and I did do it. There is another matter. I don't want to hold anything back. I paid Mr. Bacon the difference between the $4,705.87 (paid to Chittendon) and $5,000, altogether amounting to $294.13, a sort of commission; I don't know that I understood it myself exactly—a sort of commission. I didn't see any justice in it exactly, but probably I agreed to do it, and I paid him that day in money. Besides this, I paid Chittendon. I want to state further that Bacon afterwards paid me half the costs and expenses of litigation, Sanborn purchase, &c.; that was some time along in May, 1886.

Q. Did you charge him up the $100?

A. Yes; the $100 Mr. Hennessey made me pay on the settlement.

Q. State how you first ascertained what this land could be bought for.

A. Mr. Bacon, at the time he talked to me about it, said it had been hanging fire three years, and he didn't know as it could be bought at all; didn't know as Geo. N. Chittendon would deed it. I said, "You'd better find out whether he will do it and for how much." He afterwards told me he went to Mr. E. S. Chittendon and found out; that is the way the letter of Sept. 12, 1885, came to be written.

Q. From one Chittendon to the other?

A. Yes.

Recross-examination:

Q. I understand that you paid two hundred and some dollars for getting this land for you.

123 A. No, sir; I did not.

Q. Or as a kind of a commission. Let me understand what that was.

A. I paid $4,705.87 for the land.

Q. Including what you paid Sanborn?

A. No; I paid Sanborn $1,000 besides; I paid Bacon $294.13.
Q. That makes up the $5,000?
A. Yes.
Q. And the thousand dollars you paid Sanborn?
A. That makes up the $6,000.
Q. In addition to this you also carried out your verbal understanding with Bacon—let him have half what you got of the land—that is, you gave him one-quarter?
A. Well, sir, after this matter had all been settled up with Hennessey I deeded Bacon one-quarter of this land.
Q. That was in consideration of a previous arrangement?
A. That was because I had promised to do so, and I considered I was under moral obligations. Whether I was under legal obligations I didn't stop to think about.
Q. There was no money, was there? That was afterwards?
A. I didn't ask him to pay until I got through. Then he paid half these costs, as I have stated.
Q. In your conversation with Hennessey at the time of the settlement——
A. When we drew this contract?
Q. Yes; at the time you drew the contract, at the time you say he was to allow you for this hundred dollars which Bacon had of his money, did Mr. Hennessey not say to you this in substance, that he would let you have the assignment of that hundred dollars which Bacon had of his money, and did you not say in substance in reply that you had nothing to do with it? Didn't this conver-
124 sation occur, or in substance?
A. It did not. Hennessey offered to give me a written assignment of that $100, and I told him I didn't care about the written assignment; a verbal assignment would do just as well. That is all that took place; all there was about it. Hennessey knows it just as well as I do.

EDWARD ROGERS.

C. V. BACON, one of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Judge LUSK:

Q. Mr. Bacon, you are one of the plaintiffs in this action, are you not?
A. Yes.
Q. How long have you lived in St. Paul?
A. I think it will be nine years next March.
Q. What has been your business the last five or six years?
A. Real estate.
Q. Buying and selling?
A. Buying and selling on commission and for myself.
Q. You are the person who made that contract with Geo. N. Chittendon for this Washington Co. land?
A. Yes.

Q. And the one who made this contract with Mr. Hennessey that has been referred to?

A. Yes.

Q. I want you to state rather fully your efforts to get Mr. Hennessey to come up and take this deed and pay the money for that land—just a general statement in regard to it, not very fully in detail.

Objected to as immaterial & irrelevant.

A. After Mr. Hennessey had taken this assignment of the contract I had with Mr. Chittendon I was interested to the
125 extent of $500, $100 of which I had received, and I was very anxious to get the money and have the matter closed, and after a reasonable length of time had elapsed from the time Hennessey had received the abstract I went to see him and asked him when he was going to close the matter up; that I understood the deed was here. Mr. E. S. Chittendon had told me he had received the deed and was ready to close it up. I could get very little satisfaction out of Mr. Hennessey (I think he has naturally a way of not saying much to satisfy one). He said he had some objections to the title that must be fixed up. I asked him to signify to me or to Mr. Chittendon (E. S.) what he objected to and have it fixed up in shape. Some time after I learned from Mr. Chittendon that he hadn't received any objections to the title and was rather anxious to have the matter closed. I went to see Mr. Hennessey again, and I went up to the hotel. He said he was engaged, but I went up and knocked at his door and went in and told him I wanted that matter fixed, and I understood he hadn't taken any steps to close it, and I thought he ought to. He said it was their business to fix up the title. I said, "You haven't stated what the objections are." He said, "They can find out; they know as well as I do."

Q. Do you know how many objections there were?

A. He wouldn't make any specifically; he said that they knew and he knew. I told him that wasn't the customary way to do; if he had any specific objections he ought to state them to Mr. E. S. Chittendon, and he had not done so. Mr. Chittendon didn't know what the objections were, nor I didn't know. He let the matter stay that way a long time; it was impossible to get any satisfaction out of Mr. Hennessey.

126 Q. When were these conversations you speak of? Give the length of time through which they ran.

A. The conversations I had with him must have been running—well, I may say from the delivery of this contract; 1882, was it?

Q. Yes; the spring of 1882.

A. Well, I had repeated interviews with him, as I say, after he had the abstract a reasonable time, and I thought he ought to have the thing closed, and up to the time when I told him the deed from Geo. N. Chittendon was ready for him. For two or three years those interviews were, I think.

Q. After you told him the deed had arrived could you get Mr. Hennessey to come and perfect his contract?

A. No; I could not get Mr. Hennessey to do anything. I begged him to come and have a talk with Mr. Chittendon.

Q. You knew he made a tender before the deed did come?

A. He made a tender before it came. He asked specifically if the deed was there, and I told him it was not; that the deed was not there.

Q. After finding the deed was not there he went up and made a tender?

A. Yes.

Q. After the deed arrived could you get him to go up and make a tender?

A. I couldn't get him to do a thing.

Q. How long were you trying to get him to close the matter up and take his deed?

A. For a number of years; it was probably from two to three years.

Q. Wasn't it from the spring or summer of 1882 'till the fall of 1885?

127 A. Yes; fully that time.

Q. How do you recollect the conversation he says he had with you out here in front of the German-American Bank?

A. Yes; I don't know of much conversation with him. I will say here that that came up in this way: I had been to see Hennessey repeatedly and one of the last times I told him just this: Mr. Hennessey, I have been for several years trying to get you to close this deal on that land. I have told you that if you didn't do it I would bring a lawsuit. You don't care anything about a lawsuit. You would just as lief have a lawsuit as not. I have asked you as a gentlemen either to take the deed or throw up the contract and you won't do either; you won't do anything. Now, if you won't do anything I will give you a thrashing.

Q. When was that?

A. I suppose about six months or something like that before I had this row; I think about the last time I talked with him, except when I met him on the street.

Q. Had he not used abusive language which induced you to strike him?

A. I didn't have this conversation with him when we had the row. It was the conversation I had before we met on the street in front of the bank.

Q. Go ahead.

A. I had just as lief state what the whole of that interview was there.

Q. Go right along and tell it.

A. He talked with me a little reasonable after I said that; sat down in my office and talked with me (I don't know whether that

128 was at that time or the time before). I got together the papers and showed him. I had the abstract myself and this mortgage—the mortgage to Timothy R. Cressy—with the endorsement on it, and showed them to Mr. Hennessey at the time of this conversation—showed him all the papers.

Q. Did you make any effort to satisfy him?

A. I made most persistent effort to satisfy him. I never remembered such persistent efforts in my life. I wanted to settle with him. I was going to lose $500 profit if Mr. Hennessey didn't close that up—if the Chittendon deal didn't go into effect.

Defendant's counsel moves to strike out all of the answer about the persistent efforts.

Witness should state just what he did and not give his conclusions.

Q. Well, you showed him the Cressy mortgage; is that the Sanborn mortgage?

A. It was. As I understood, it was a mortgage Sanborn claimed an interest in. He claimed his wife had an interest in the mortgage. This mortgage seemed to be assigned by Timothy R. Cressy and wife—this Cressy-Moore mortgage. I showed that to Hennessey. I got it from E. S. Chittendon to show him.

Q. When was that?

A. I think that was—I don't recollect just when it was. It ran along over a number of years.

Q. It was prior to the sale to Rogers?

A. Yes; a long time before that.

Q. Did you try to satisfy him in regard to the 40 acres—the title about that?

A. I didn't know much about that. I thought possibly the power of attorney had been made and might have been lost.

129 Q. You gave him all the information you could?

A. Yes; I was working with Mr. Chittenden a long time trying to clear the matter.

Q. But nothing would satisfy him?

A. Nothing would satisfy him.

Q. Now come along up. You met him in front of the German-American Bank?

A. I was walking with Mr. Rogers, and Mr. Hennessey met us and he says, "I want to talk to you." I was provoked by the way he had acted and I said, "Mr. Hennessey, I don't want to talk to you about anything. I don't want anything to say to you. I have got entirely through with you." Do you want all I said—all the circumstances?

Q. I don't know as I care about it.

A. I said, Of one thing you can rest assured, that you won't get that $100 back.

Q. Did he use abusive language to you?

A. Yes; he made some remark about my being dishonest, and I knocked him down.

Q. After Mr. Rogers bought this land did you have any talk with him (Hennessey)?

A. Never had any talk at all; never had any other talk except just the remark I made when we had that row.

Q. That was before Mr. Rogers bought the property?

A. No; I think that was after; that is my recollection, that it was after he bought the property.

Q. Well, after that talk in front of the bank in which this abusive language occurred and you struck him.

A. Never had any other conversation of any kind whatsoever with Mr. Hennessey since that day.

130 Q. When was that? I want to fix about the time that occurred. Was it in Sept. or the fall of 1885?

A. It must have been. I don't know whether it was Sept. or Nov.

Q. Do you know what year it was in?

A. I think in the fall of 1885. The Minnesota club-house had been open only a short time, and I know I walked from there to the club.

Q. Did you have any other talk with Hennessey between the time Rogers bought the land and the time you had the talk in front of the bank?

A. No; I didn't have any conversation at that time.

Q. You have heard the testimony of Mr. Rogers?

A. Yes; I have.

Q. You were sitting in the room while it was taken?

A. Yes.

Q. Was any part of the money that he paid for the land your money?

A. Not a dollar of it.

Q. Or was it paid out of his money to be replaced by your money?

A. Not a dollar of it.

Q. Or any such talk?

A. No.

Q. When you bought the second quarter of the land what was the consideration you paid him for it?

A. I heard Mr. Rogers' testimony and it was just as he stated. I sold him a half interest in the G. V. Bacon's Addition to St. Paul and he paid me so much cash and assumed a portion of the mortgage and turned in this land for about $10,000.

Q. After this action was brought for partition just state what you required—what complaint you made to Mr. Rogers and about your talk with him.

131 A. Mr. Hennessey was notified first——

Mr. McCARTEY: Was that your personal knowledge?

Judge LUSK: Leave out about that; just what was between you and Rogers.

A. I brought suit for partition. I wanted to divide the land so I could put it on the market, and when this answer of Mr. Hennessey's was filed Mr. Rogers and I had some little talks about it. I told him I wasn't figuring on a lawsuit when I bought this land, and if it was going to be tied up a long time, if there was going to be a lawsuit, I thought probably he ought to take it back. We waited, however, till the suit was removed—took a change of venue

to this court, showing the suit couldn't be determined within a reasonable time, and finally Mr. Rogers bought the land back.

Q. What did he pay for it?

A. $10,000; $8,000 in mortgage notes, Chas. P. Coleman, on which he endorsed guaranty of collection, and he paid $2,000 in cash to make the $10,000; at this time the property had already increased in value a great deal.

Q. In a letter that has been introduced in evidence, I think, to Geo. N. Chittendon, it makes E. S. Chittendon say, "He wants to know what you will take for the land." Do you remember anything about that?

A. When Mr. Rogers decided to buy the land there was some doubt in my mind whether he could buy it, because the matter had run on so long a time from the original contract I didn't know whether he would let it go for that price, so I went to see Mr. E. S. Chittendon to find out whether the land could be had, and I asked if he thought the land could be got, and he said he
132 would have to hear first from Mr. Geo. N. Chittendon. The object of my doing so was so Mr. Rogers could buy it, because I was to get so much commission out of it.

Q. Is this land vacant, unoccupied land?

A. It is unoccupied.

Q. Has it buildings on it?

A. No.

Q. Is it enclosed?

A. It is enclosed—well, it is virtually enclosed; there is fencing on one side, but that is for other land—fencing in other land.

Cross-examination:

Q. You don't remember—you have no recollection yourself as to the date of your contract with Geo. N. Chittendon?

A. Not the exact date.

Q. Do you remember about when it was?

A. In 1881 or 1882. I couldn't tell you.

Q. What time of the year?

A. I can't say.

Q. Have you any recollection as to the date of your contract with Hennessey?

A. Not clearly, I have not.

Q. Can you tell what time of the year it was?

A. No.

Q. Can you tell what you did about getting Mr. Hennessey to carry out his side of the contract?

A. What I did?

Q. Yes.

A. Yes.

Q. Do you know how long a time it was after the tender had been made that you first saw him in regard to it?

A. Approximately I can tell you.

Q. Well, approximately.

A. I should judge, probably thirty days, nearly; maybe a shorter time—the usual time in which I would expect to close a contract.

133 Q. You knew Mr. Hennessey had the contract?

A. Yes; I must have known it.

Q. You went to see him about it. Do you know where you saw him?

A. About the first time I saw him—I saw him so many times; of course, my recollection is not clear when each time was, but I have a distinct recollection of seeing him at the Merchants' Hotel in the summer.

Q. Do you know how long that was after your contract with him was made?

A. I do not.

Q. Have you any distinct recollection as to how many times you saw him?

A. No distinct recollection, but it must have been a dozen times. I stopped him frequently on the street.

Q. Did you see him at any other place besides his room?

A. Yes; at my office and on the corner in front of my office.

Q. Several times you met him on the street and stopped him?

A. Yes, sir.

Q. You knew there was some trouble about the title, did you not?

A. Yes, sir.

Q. You went to Chittendon and talked it over, did you not?

A. Yes.

Q. Tried to get Chittendon to fix up the title?

A. Yes.

Q. In your talks with Hennessey you tried to get him to take the land without the title being fixed up?

A. I tried to get him to signify clearly to Mr. Chittendon what his objections were.

Q. You got the idea from Mr. Chittendon that Mr. Hen-

134 nessey wasn't telling Mr. Chittendon just what his objections were?

A. I got the idea from Hennessey and Chittendon, too.

Q. What did Mr. Hennessey say in regard to that?

A. He said it was his business to fix up the title.

Q. He had already made his objections to the title, hadn't he?

A. I don't know.

Q. You don't know whether he had or not?

A. For a long time I knew that he didn't make any objection—that is, Mr. Chittendon had told me he couldn't find out from him what his objections were.

Q. You knew Mr. Horn had examined the title for Mr. Hennessey, didn't you? Mr. Hennessey told you that, didn't he?

A. I don't remember.

Q. He didn't say anything about Mr. Horn?

A. I don't remember anything about that.

Q. Didn't Mr. Hennessey say anything to you to the effect that

they needn't come to him; they knew what the objections were; to go and see his attorney?

A. No.

Q. Didn't say he knew what the objections were?

A. He didn't say that; no.

Q. He said they knew what the objections to the title were?

A. He said, "They ought to know I do."

Q. Didn't he say they did know?

A. I don't remember.

Q. You think you didn't so testify on your direct examination?

A. My intention was to testify that I could get very little satisfaction out of Mr. Hennessey.

Q. What did you want him to do?

135 A. I wanted him to do this, to see Mr. Chittendon and express clearly what his objections were and have the thing fixed up with Mr. Chittendon, if it could be fixed up.

Q. You wanted Hennessey to have the interviews with Chittendon so the thing could be fixed up that way?

A. Yes.

Q. And Mr. Hennessey said he would have nothing to do with Mr. Chittendon?

A. Yes.

Q. Didn't he say he knew what these objections were other — Mr. Horn, his counsel, fixing them up; and didn't we say that if they would fix it up to the satisfaction of Mr. Horn it was all right?

A. Didn't say that to me.

Q. Then you didn't know Mr. Horn had anything to do with it?

A. Not from Hennessey.

Q. But you did from some one?

A. I think I did, some way or other.

Q. Did you go and see Mr. Horn?

A. I believe I did, now you speak of it.

Q. Did you see Mr. Chittendon frequently for the purpose of getting Mr. Chittendon to clear up the title?

A. Yes, sir.

Q. You knew there were two particular objections to the title, didn't you?

A. The first year or so I didn't know what the objections were. I didn't know much about it.

Q. You hadn't much interest in it except to get sure of your $400 out of it?

A. Yes; that was all.

136 Q. In all those interviews you were trying to get Mr. Hennessey to go and fix up the title or assist them to get it fixed up or take it without its being fixed up?

A. I endeavored just this, to get Mr. Hennessey and Mr. Chittendon together, as I understood Mr. Hennessey objected to the title. Mr. Chittendon informed me he had no idea what Mr. Hennessey's objections were, so I endeavored for a long time to get Mr. Hennessey and Mr. Chittendon together, so that they could talk the matter

over and clearly understand what his objections were and, if possible, to get it fixed.

Q. That was what you was talking to him about generally all this time?

A. Yes, sir.

Q. You did expect he would take the property as it was, if the title was good, and pay the money, did you?

A. I expected him to walk up there and pay the money, or else give up the contract. If he wasn't satisfied he might give it up.

Q. Did you ask him to give it up?

A. I did, afterwards.

Q. How many times did you ask him to give it up?

A. I think, after awhile, when I found he wouldn't take the deed—I think every time the question was, "Mr. Hennessey, will you take your hundred dollars back and give up the contract or take the land?"

Q. That would have left you at liberty to close the matter?

A. Yes, sir.

Q. Then you did ask him to give up the contract or else take the title as it was?

A. Yes; I told him to go to Mr. Chittendon and get Mr. Chittendon to clear the title in the way that was usual to do.

Q. The property was rising all the time in value?

A. Yes; I thought that was the reason Hennessey wasn't
137 willing to do anything.

Q. You was desirous of getting it?

A. No; I didn't. I felt that he had all the interest I had in it.

Q. You wanted him to take back his claim, and then the matter would have been left in your hand?

A. I don't think that. I felt that Geo. N. Chittenden, if the contract was not closed up in some reasonable time, would be tired of waiting that length of time, and I wouldn't get the $400 balance of my $500. Mr. Hennessey wouldn't do anything—nothing would be done—so to avoid that, if Mr. Hennessey wouldn't take the land, I wanted him to take his $100 back and throw up his contract.

Q. You went to see Mr. Hennessey at his room?

A. Yes.

Q. About what time was that?

A. I couldn't tell when it was.

Q. You saw him in his room?

A. I saw him in his room.

Q. You and he were alone there?

A. I think so.

Q. Was that the time you told him — wanted him to do something or you would thrash him?

A. No, sir.

Q. When was that?

A. That was in my office.

Q. Did you call him in there?

A. Yes; and then he went home.

Q. What time was this?

A. I think that was—it might have been six months or eight months, something like that; it might have been a year
138 before Mr. Rogers bought the property.

Q. Did you ever talk with him after that before the time you met him down here, after Rogers bought the property?

A. I think that conversation in my office was the last conversation I had with him, except when we met on the corner.

Q. When you met on the corner and had the trouble?

A. Yes.

Q. Are you a trained boxer, Mr. Bacon?

A. No, sir.

Q. Had some practice in boxing?

—. Never practiced as an athlete. As a boy, I suppose I may have.

Q. Boxed some?

A. Not for a long time.

Q. How long is it since you practiced boxing?

A. I never practiced boxing, as far as I can recollect. I may have as a boy; I don't know, but I am not a boxer.

Q. You remember the conversation you had with him at the time you struck him down here, do you?

A. There wasn't much conversation. I told him I didn't want to talk to him; I didn't want to talk to a man like him any more; I was through with him; then I knocked him down. I don't know whether he went down or not; I hope so. I was going to knock him again if he'd offered any defence.

Q. But he didn't offer any defence?

A. No; I wouldn't hit him again if he hadn't the courage to defend himself.

Q. Do you remember what you said to him at the time?

A. I think I do.

Q. Do you remember what he said to you?

A. Yes.

139 Q. In regard to the land?

A. He didn't say anything in regard to the land; just said something about "I want to speak to you."

Q. You were excited and didn't notice what he said?

A. No; I wasn't excited in the least.

Q. He wanted to speak to you about the land?

A. I don't know.

Q. You understood it so, didn't you?

A. I suppose it might have been, but he didn't mention it.

Q. You don't remember what, if anything, he said about the deal?

A. No; didn't have time; didn't talk about the deal; just said he wanted to speak to me, and I said, "I haven't anything to talk about with a man like you; I haven't anything to say to you." I probably said something else uncomplimentary. He spoke back and I struck him. It was just a few moments; there wasn't much discussion.

Q. You say you didn't have any interest in the money Mr. Rogers furnished about this land, do you?

A. It wasn't my money.

Q. You say you didn't have any interest in it whatever?

A. No.

Q. But you had an interest in the land after it was bought. That was the understanding between you and Mr. Rogers, that you was to have a part of it?

A. I was to get a commission.

Q. Anything more?

A. Well, it depends upon what you call it. I was to get something like $200 cash and have an interest in the land.

140 Q. That was the arrangement between you and Rogers?

A. Yes, sir.

Q. He was to furnish all the money and you was to have half the land?

A. That wasn't the question. Mr. Rogers bought the land and I made the arrangement.

Q. The arrangement was that he was to furnish all the money and you was to have part cash and half the land he got?

A. The arrangement was he was to buy the land and pay me so much commission—the difference between $5,000 and the amount he paid—and when he got the land with the clear title he was to give me half the land upon my paying half the expenses necessary to clear the title.

Q. And any litigation necessarily incurred?

A. I suppose so.

Q. Of course, you contemplated when you made the arrangement that litigation might be necessary in order to get the title cleared?

A. I don't remember that specially.

Q. You contemplated there might be some litigation with Hennessey?

A. I don't know whether there was anything about that or not. I was to pay half the expenses.

Q. That was contemplated, wasn't it?

A. I was to pay half the expenses.

Q. It was rather an unusual arrangement, was it not?

A. No; not unusual. I have other deals about the same. I have other parties who buy a piece of land, furnish the money, and give me half the profits. Mr. Rogers did the same thing. He has bought some pieces of land and given me half the profits.

Q. Were you to get control of the property in some way?

A. No.

141 Q. Do you mean to say it is customary sometimes for men in your business without any inducement to give you half the profits in their deals?

A. It is customary sometimes for real-estate men to get half the profits of a real-estate investment. Other people furnish the money and they sell or handle and get half the net profits.

Q. Just for handling it?

A. Yes; that is customary.

Q. Then you had the handling of this property, so you got Mr. Rogers to get the title cleared?

A. That wasn't in this case.

Q. There wasn't any such thing in this case?

A. Not the way you speak.

Q. Did you consent to let Mr. Hennessey have the deed to half that property?

A. The way you put it, yes. Mr. Rogers spoke to me, and I was perfectly willing he should make any deal he wanted to with Hennessey.

Judge LUSK: I would rather you would testify to what you know.

Mr. MCCARTEY: I object to counsel instructing the witness now.

Judge LUSK: I object to the answer of the witness and ask that it be stricken out. You ask him for facts and he gives you impressions.

Q. I will ask you if Mr. Rogers didn't ask your consent.

A. No.

Q. But he spoke to you about it and you was willing he should do it?

A. He spoke to me about it. As far as I was concerned I
142 was satisfied. I think he spoke to me about it. I am not quite sure about it.

Q. You was willing he should do that?

A. Yes.

Q. But you wouldn't have got so much land as if he hadn't done it?

A. No.

Counsel for defendant makes request of counsel for plaintiffs to continue cross-examination next morning at 10 o'clock, if desired by defendant Hennessey, who was necessarily absent from the examination.

To which counsel for plaintiffs agrees.

Redirect examination:

Q. There was no written agreement—anything like that—between you and Mr. Rogers in relation to this first quarter he deeded to you?

A. No.

Q. No deed or written agreement before he settled with Hennessey and became the owner?

A. No.

Q. So, if I understand it, it was a mere verbal understanding that if he got the title and became owner of it he would let you have a half interest on such terms as you have mentioned?

A. Yes.

Q. And that required you to pay half of whatever expenses became necessary, whatever he had to pay?

A. Over and above what he paid Chittendon.

Q. Whatever it cost him to get rid of the Sanborn claim or any other expenses?

A. Or any other expenses.
Q. You didn't get the whole of it, I believe?
A. No; only a part of it.
Q. Did you pay him half of the expenses?
A. Yes; I made settlement with him and paid him half
143 of what he figured.
Q. Half of what he paid Sanborn?
A. I suppose it was.
Q. It aggregated one-half the costs, I think Mr. Rogers stated—the costs and expenses—but what he paid Sanborn——
A. Oh, yes; what he paid Sanborn was included.
Q. This final arrangement you had with Mr. Rogers, was that before or after Rogers was obliged to give Geo N. Chittendon a bond?
A. That was before.
Q. Did you go on that bond?
A. No; I wasn't here.
Q. Did you agree to that bond or have anything to do with it?
A. No; I went to Europe some time in the latter part of November.
Q. It was given without your knowledge, was it not?
A. Yes.
Q. Didn't Mr. Rogers charge up to you that $100 you got of Hennessey?
A. Yes; that was in the settlement.
Q. When you made your settlement with Rogers he charged you with that $100?
A. Yes; he said Mr. Hennessey insisted on putting in that claim against the settlement.

Defendant's counsel asks that the clause in regard to what he said Hennessey said be stricken out as hearsay and incompetent.

(Signed) G. V. BACON.

Adjournment was here taken till 10 o'clock, Nov. 1, at which time
counsel on both sides appeared, but no further testimony was
144 offered on either side, and final adjournment was taken.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

I, —— ——, a notary public in and for the county of Ramsey and State of Minnesota, do hereby certify that the above depositions were taken before me, in pursuance of stipulations on file in this case, at the office of Mr. H. C. McCartey; that they were taken upon verbal interrogatories; that they were reduced to writing by myself; that they were taken to be used in the action now pending in the United States circuit court for the district of Minnesota in which Geo. V. Bacon and Edw. G. Rogers are plaintiffs and David J. Hennessey is defendant; that each witness before testifying was by me duly sworn to testify the whole truth and nothing but the truth, and that the

testimony of each witness was carefully read over by him in my presence before signing and then signed in my presence.

Nov. 15, 1887.

A. W. CUMING,
[SEAL.] *Notary Public, Ramsey County, Minn.*

Endorsed: Filed Nov. 16, 1887. Oscar B. Hillis, clerk.

145 United States Circuit Court, District of Minnesota.

GEORGE V. BACON and EDWARD G. ROGERS
vs.
DAVID J. HENNESSY.

I, Fred. Bennitt, the notary public named in the hereto-attached notice, do certify that the following testimony or deposition of George N. Chittenden was taken before me at my office, No. 107 South Ottawa street, Joliet, Illinois, on the 14th day of October, 1887, at ten o'clock in the forenoon of that day, and was reduced to writing by C. A. Strong, a disinterested person, in my presence and under my direction.

It is stipulated by and between the parties that the deposition may be taken in short-hand by a stenographer, under the personal direction of the commissioner, and reduced by him to type-writing without objection on either side.

146 GEORGE N. CHITTENDEN, a witness of lawful age, produced and sworn, was examined in chief by Mr. BROWN, and testified as follows:

Q. State your full name.

A. George Newton Chittenden.

2. Where do you live?

A. Plainfield, Will county, Ill.

3. What is your business?

A. I have no special business at present. I have been in the general trade—merchant—until some two years ago.

4. In 1882 were you the owner of a certain 200 acres of land in Washington county, State of Minnesota?

A. I was, I believe, to the best of my knowledge. I had a deed for it.

5. Do you remember the description?

A. I do not.

Q. 6. Which way from St. Paul did it lie?

A. East, I believe, about five miles.

Q. 7. You owned only one tract there, I suppose, of 280 acres?

A. There were three eighties lying side by side, and forty acres lying, some, I think, eighty rods north of the three eighties; I suppose it would make two tracts.

Q. 8. Well, I mean one body of 280 acres, whether lying together or not?

A. Yes; there were 280 acres.

Q. 9. That was all the land you owned?

A. That was all I owned in Minnesota.

Q. 10. Do you remember making a contract for the sale of that land to one Bacon in the year 1882?

147 A. I made a contract with a man who was introduced to me as George V. Bacon some time in the spring of '80. I don't remember the exact date. I remember there was snow on the ground when I went up there, and it was sloppy when I was there.

Q. 11. Was it '80 or '82?

A. '80, I think.

Q. 12. Think that over to be certain of the date and the year.

A. Well, that is according to the best of my recollection.

Q. 13. You made but one contract?

A. I made but one contract with Bacon.

Q. 14. And that covered the 280 acres?

A. Yes, sir.

Q. 15. What was the consideration?

A. Well, my memory is not very good. I have got some mixed up in having received letters stating different amounts, but I think it was $4,400.00; that is to the best of my recollection.

Q. 16. Did you afterwards leave the matter in the hands of any person at St. Paul?

A. The contract was passed over to E. S. Chittenden at the time it was made. He was my attorney there. It was made in E. S. Chittenden's office, but held by Mr. Bacon.

Q. 17. Did anybody act as your agent there after that in reference to the matter?

A. Yes, from that time on; and even, I think, before that Mr. Chittenden was my agent—Mr. E. S. Chittenden, of St. Paul.

Q. 18. Did he continue to act as your agent in this matter up to the time of the consummation of that bargain?

A. He acted as my agent up to the fall, I think, of '85,

148 when the land was deeded to Mr. Rogers; E. G. Rogers, I think it was.

Q. 19. Did you learn from your agent there of the contract to Mr. Bacon having been assigned; if so, to whom?

A. Mr. Chittenden wrote me at one time that Mr. Bacon had assigned the contract to Mr. Hennessy.

Q. 20. Did you likewise learn from him that any tender had been made under the contract from Mr. Hennessy?

A. Yes, sir; he wrote me at one time that a tender had been made by, I think, Mr. Hennessy, which tender he acknowledged as a legal tender, I think, was the words of the letter.

Q. 21. Do you remember whether or not at that time any deed had been executed under the contract or had been——

A. The deed had been sent over to—the deed made to Bacon, which Bacon had never taken out.

Q. 22. Do you remember whether or not the deed had been sent prior to the time that you received the notice from Mr. Chittenden in reference to the tender, or was it afterwards?

A. I think the deed—I am not positive in regard to that—my

impression is that the deed to Bacon—it seems to me there was a deed made to Bacon. I have not anything to show the date of the transfer to Hennessy. I think the deed was to have been executed in June, the latter part of June, I think, after the contract
149 was made, and my impression is that a deed was sent up in the name of Bacon, which, I think, was afterwards returned when the deal was made, as I was informed by Mr. Chittenden, between Hennessy and Bacon. That is according to the best of my recollection.

Q. 23. Did you, prior to or after the making of the Bacon contract, learn of any defects in the title?

A. Yes, sir.

Q. 24. What did you learn?

A. I learned there was three mortgages on the records unsatisfied. At the time I purchased the land I was informed that there was a clear—that the title was perfect.

Q. 25. Did you take any steps to inform yourself as to the validity of those mortgages or whether they had been paid?

A. I ascertained, or at least was informed, that they were out by limitation. I never took any steps to remove what was called the cloud.

Q. 26. Did you learn of a certain mortgage—might be called the Cressy-Moore mortgage?

A. Yes, sir; I heard of the mortgage. I wrote to Mr. Moore, of New Haven, Connecticut, of whom I purchased the land, in regard to the matter. He wrote me a letter stating that he supposed the land was clear when he sold it to me; that the mortgage made by him to Cressy was paid and the notes taken up, and that the mortgage had been sent to him, and the notes, as I say, were taken up. He stated that the notes he could not find, but sent me the mortgage, which purported to have been given by him to Cressy.
150 I remember that the mortgage was made—I think it is to T. R. Cressey, and his wife's name I don't remember; it appeared to be a joint mortgage made to the two.

Q. 27. You saw the mortgage afterwards, did you?

A. Yes, sir.

Q. 28. Had it in your possession?

A. Had it in my possession and sent it to E. S. Chittenden, St. Paul.

Q. 29. Your agent?

A. Yes, sir.

Q. 30. Was that mortgage marked "paid" or "cancelled?"

A. There was an endorsement on it, and I am not positive whether it was marked "paid" or whether it was transferred to one, I think, Talbot. If you will let me look at a letter I can tell whether I am correct in that name or not. I think I have a letter from Mr. Moore—Torbett is the name, and that this Mr. Torbett was aware of the mortgage being paid, and whether—I don't remember now whether the mortgage was assigned to Torbett and he sent it to Moore or whether it was a sort of satisfaction of the mortgage. I cannot tell as to that from memory.

Q. 31. Do you remember how soon you sent the mortgage to E. S. Chittenden at St. Paul?

A. I do not. It was after the contract was made with Bacon. I think it was in '78. Without reference to a letter written me by Mr. Moore I couldn't tell.

Q. 32. I mean at what time you sent the mortgage to your agent at St. Paul?

A. Well, I sent it—I think right away after receiving it—is
151 my impression as to that. I think it was.

Q. 33. Was that before you finally gave your deed?

A. Yes, sir; I think so.

Q. 34. After the making of the contract, after you had information of its being assigned to Mr. Hennessy, did you receive any letter from your agent?

A. Yes, sir.

Q. 35. Have you got the letter?

A. I have got two letters from him, which I do not remember whether they were—I think they were before, according to my memory—before the deed was sent to Mr. Hennessy—before the deed was sent to Mr. Rogers.

Q. 36. I am speaking of one letter after you received notice that the contract had been assigned to Mr. Hennessy. See if you had it there—some time in the year 1885.

A. I did receive a letter from Mr. Chittenden dated Sept. 12, 1885.

(Mr. ROGERS:) Your attorney, Mr. E. S. Chittenden, up there, was put on the stand: I don't know anything about these letters, and I don't care anything about them personally.

(The reporter is directed by Mr. Brown to take down the remark of Mr. Rogers, whereupon a discussion arises between those gentlemen as to the propriety of such remarks being reported.)

(Mr. ROGERS:) I will state to Mr. Chittenden, and you can take it down or leave it out just as you are a mind to—but on an examination up there Mr. E. S. Chittenden, your lawyer, objected to any correspondence being introduced that passed between you and
152 him on the ground it was private matter between you and him. Of course I am not your adviser, but I will just advise you of what took place there, and you can do what you are a mind to about it. I don't care anything about it one way or the other, personally, whether they go in or not. Now, having done my duty, you can fire ahead. That is all I have got to say about it and all I care about it. Mr. Chittenden, of course, is his own master.

(Mr. BROWN:) There is not anything in this letter that Mr. Chittenden wants to conceal for your benefit or anybody's?

(Mr. ROGERS:) I know nothing about it. I don't know that there is anything I want to conceal. I am just stating for his benefit what his lawyer did, and you can do as you are a mind to do about it. I am not asking any one to conceal anything for my benefit. I don't know anything about it nor never saw it until I saw it here.

(Mr. BROWN:)

Q. 37. You say the letter is dated Sept. 12?
A. I received a letter from Mr. Chittenden dated Sept. 12, '85.
Q. 38. He was still your agent at that time?
A. Yes, sir.

(Mr. ROGERS:) The reason I stated this publicly is so that there will be no claim there was anything underhanded. I have not hunted up Mr. Chittenden to bushwhack him or (technical term) him or anything of that kind.

(Mr. BROWN:) Mr. Chittenden is not a man who has anything to conceal—not that kind of a man.

153 Q. 39. Did that letter refer to this same land matter and contract with Bacon?
A. Yes, sir.
Q. 40. And you say you have the letter in your hand?
A. I have that letter dated—yes; at that time.

(Mr. BROWN:) Now, I desire to offer that in evidence in connection with his testimony and let Mr. Rogers see it, if he desires.

(Mr. ROGERS:) I don't care to see it at present.

(The WITNESS:) I don't know how you will get it to offer it in testimony.

(Mr. ROGERS:) I want to object to the admission of this letter on the ground that it is incompetent and irrelevant; that it is between parties who are not parties to this suit. It is a private correspondence between Mr. Chittenden and his agent.

(Mr. BROWN:)

Q. 41. Will you read the letter, Mr. Chittenden, to the reporter if you don't want to part with it?

A. Well, I am at a loss how to act in this matter. I don't know whether I ought to do that thing or not. I don't know but I should receive instruction from Mr. Bennitt. If he was the judge sitting on the bench I would ask him what I ought to do in this matter.

(Mr. BENNITT:) Usually in cases of this kind, where objections are made, the objections are minuted and the testimony produced. That is the practice about it generally. You object to this, Mr. Rogers?

154 (Mr. ROGERS:) I don't object for Mr. Chittenden. I am not his lawyer. I object for myself. Mr. Chittenden is his own judge whether he wants to show the correspondence or not. That is his matter. If he wants to get a lawyer he can do it. I am merely stating to him what position his lawyer took up there. Of course that don't bind him down here. He understands all about that.

(The WITNESS:) I don't know of no reason why the letter should be excluded or taken into account, as far as I am concerned. On my part I have no objection to either party knowing just what was in the letter in regard to that matter.

(Mr. BROWN:) I think that covers the ground, then, Mr. Chittenden.

(Mr. ROGERS:) You are the judge, then, Mr. Chittenden. If you have not I have not. Of course I shall insist on my legal objection.

Q. 42. If that is the case, Mr. Chittenden, I would like to have you allow the letter to be used as an exhibit to your deposition.

A. Do you want a copy of the letter—a copy of the whole letter? I think there are some things in it—there was a couple of propositions made by Mr. Bacon in regard to the deal.

Q. 43. Well, state what those propositions were.

(Mr. ROGERS:) That I object to.

(Mr. BROWN:) Have you any objections, Mr. Rogers, to the
155 — being read either by yourself or by the notary public and a copy go in, verified by yourself, subject to your correction?

(Mr. ROGERS:) I have no technical objections to raise at all. If Mr. Chittenden says he wants to put in those letters, then, of course, I simply make my objection and will have to abide by it.

(Mr. BROWN:) What I mean is this, will you yourself read the letter so that you are certain that the copy taken down by the stenographer is accurate? Have you any objection to that being done, preserving your legal rights?

(Mr. ROGERS:) I don't see as I can have any objections to that, provided Mr. Chittenden wants to put them in.

(The WITNESS:) Well, as to my wants I don't know as that ought to be regarded in this case. I am not a party to the suit, I believe, and I don't, so far as I know, I don't see as there could be any advantage taken by either side in regard to these letters. I may not be posted in regard to the matter.

(Mr. ROGERS:) I don't know as there was anything about them, but that lawyer, E. S. Chittenden, did not seem to want the letters to go in. I don't know anything about them; never read the letters, never saw them.

(Mr. BROWN:) Will you let Mr. Bennitt take them and read the letters to the reporter?

(Mr. ROGERS:) Why can't the letters go right in? That
156 is, if you want to put the letters in let them go right in.

(The WITNESS:) I don't care whether the letters go in or not. I am, to all intents and purposes, an outside party, as I understand it. Whether the letters go in or not it is immaterial to me.

(Mr. BROWN:) He says it is to him. Then I wish that you would, on our behalf—you will let him, Mr. Bennitt, have them to attach.

(Mr. ROGERS:) If they are going in at all I think we better have the originals; that is what I shall insist on.

(Mr. BENNETT:) Then do you offer them?

(Mr. BROWN:) Yes, sir.

(The WITNESS:) Wait until he gets them, will you? I have not made up my mind to give them to him yet. I don't know but I have some rights in regard to this letter. I don't know as there is anything in it, though, that would—perhaps you would like to read the letter, Mr. Rogers?

(Mr ROGERS:) Well, I don't care about it. What Mr. E. S. Chittenden wrote you won't affect our case at all, but he seemed to have some personal reason.

(Mr. BROWN:) If he don't care and it don't affect you, we think the letter bears on the case and desire to offer it.

(Mr. ROGERS:) Of course, I object to the letters on the ground they are incompetent, irrelevant, and nothing to do with the case, and you object to them on entirely different grounds.

157 (Mr. BENNETT:) Of course that is mere privilege of the witness.

(Mr. ROGERS:) Of course that is mere privilege of the witness. If they come in at all I want the originals to come in.

(The WITNESS:) Well, I don't know that the letters are any particular benefit to me or letters that I would care to retain particularly.

(Mr. BROWN:) We only care for that one of September 12.

(The WITNESS:) Supposing that I see an attorney about this matter, what ought I to do?

(Mr. BROWN:) Certainly, Mr. Chittenden, there is no objection in the world.

(The WITNESS:) Well, let it remain as it is for the present and until I ask some outsider.

(Mr. BROWN:) We can't go on very much further, you know, until that has been determined.

(The WITNESS:) I want to see just what I of right ought to do in this matter.

(Mr. BENNITT:) As I understand the law, this is a communication between his attorney and himself.

(Mr BROWN:) Why, no; it is a not a privileged communication at all; it is a matter of business between himself and his agent.

(Mr. ROGERS:) It is a letter written by his attorney to him?

(Mr. BROWN:) No; a letter written by his agent.

(The WITNESS:) He was my attorney as well as agent; covers both, you might say. I regarded him as such at all

158 events; acted in a sort of double capacity, you might say, in regard to—although more particularly as an agent, I think. I don't wish to do anything to prejudice Mr.—the case of Mr. Rogers or the case of Mr. Hennessy or Mr. Bacon. I have nothing to cover up or conceal, and, so far as friendship is concerned, I know just one, as well as all other, between these two men.

(Mr. BROWN:) Well, will you consult somebody right off?

(The WITNESS:) Yes; I think I can within a very short time. To me it is immaterial about the matter.

(The examination is discontinued for a short time to allow the witness to consult an attorney.)

Upon his return the examination is continued as follows:

Q. 44. Well, Mr. Chittenden, how——

A. Well, while I don't wish to help one side more than the other, the gentleman that I consulted about this, the attorney, says that

the letter from my attorney is not—it is just as I dispose about it, whether I let it come in or not; but, as I said, I have on my part no objection. I would prefer that these two gentlemen would settle that matter between themselves.

(Mr. BROWN:) Well, Mr. Rogers pretends that he has no objection on his part.

(Mr. ROGERS:) I don't pretend any such thing. I told Mr. Chittenden what his attorney did, and he can do what he is a mind to do. I don't have any objection on the ground of being the
159 attorney of Mr. Chittenden, anything of that kind. I will take his decision about it.

(Mr. BROWN:) You object simply for yourself and not for him, although you told him what his St. Paul attorney said?

(Mr. ROGERS:) I have stated my objection several times, so that there cannot be any dispute or doubt about it.

(The WITNESS:) He also said it was better way to hand the letter to—he asked me who the evidence was before, and I told him, and he said the better plan would be to hand it to Mr. Bennitt and let it be copied, and let the court there decide whether it was evidence — had any bearing upon the case or not. Will you return this to me, Mr. Bennitt, when it is copied?

(Mr. BENNITT:) Well, that depends somewhat upon the action counsel take in the matter.

(Mr. BROWN:) What do you say, Mr. Rogers; have you any objection to the copy going in?

(Mr. ROGERS:) Well, I suppose we better have the original letter go in, if any at all.

Q. 45. Have you any objection to letting it be attached to your deposition, if it is kept safe?

A. Which; this letter?

Q. 46. Yes; the original.

A. No, sir; I don't think that I have.

Q. 47. Well, we would rather do that, so that it will be kept safe for you, so that it will be returned to you after the court has passed upon this question.

A. There is nothing particular there that I care to keep.

160 (Mr. ROGERS:) Well, I guess if the old gentleman wants to keep the letter and is willing to put it in, I will let it be copied. Of course, I want to be treated the same way when I come to my testimony.

(Mr. BROWN:) If the original, it will be filed in the United States court, where it will be perfectly safe if you should want it again.

(Mr. ROGERS:) I am willing to consent to let the copy go in.

(Mr. BROWN:) We would rather have the original.

(The WITNESS:) The letter is no benefit to me, that I know of. I don't know for what reason I should want it back.

(Mr. ROGERS:) You can get it back, if you want it, in seven years. I ain't going to make any technical objection about a copy.

(Mr. BROWN:) You prefer the original to a copy?

(Mr. ROGERS:) Oh, I don't care anything about it one way or the other.

(Mr. BROWN:) Well, we would rather have the original, and if Mr. Chittenden don't object we will insert it.

(The letter of date September 12, 1885, is marked "Exhibit A" to Mr. Chittenden's deposition.)

Q. 48. I will ask you if you accepted either of the propositions embraced in that letter?

A. No, sir; I did not—yes; I did; I sent him a telegram which one I would accept, I think.

Q. Which one did you accept—I mean which of the propo-
161 sitions embraced in the letter?

A. Well, I was trying to think just how that letter read. Let me see the letter, please?

Q. 50. Did you accept the proposition of $4,600.00?

A. According to the best of my recollection, I did.

Q. —. Who did you make known your acceptance to—your agent there, Mr. Chittenden?

A. I think I sent him a telegram, as he requested.

Q. 52. Well, now, you may state whether in pursuance of that acceptance you afterwards gave a deed.

A. I think it was subsequent to that that Mr. Chittenden wrote to me that Mr. ——, through some arrangement — Mr. E. G. Rogers, would take the land and pay the money. I think it was subsequent to that letter that he would deal with both Mr. Bacon and Mr. Hennessy and hold me harmless for anything in this contract to Bacon.

Q. 53. That was the letter from your agent?

A. The letter from my attorney. As I say, he was both agent and attorney; possibly acted in a double capacity.

Q. 54. Have you got that letter?

A. No, sir; I have not. The one that he wrote to me that——

Q. 55. Mr. Rogers was to take the land.

A. No, sir; I have not. I have searched for it, but couldn't find it.

Q. 56. Have you searched all the places where you usually keep such papers?

A. Yes, sir.

Q. 57. And you are unable to find it?

A. I was unable to find it, and I had one of the clerks looking, and also my former partner.

Q. Was it in your custody the last you knew anything
about it?

162 A. Yes, sir.

Q. You are able to say, then, it is lost, or at least you can't find it?

A. Yes, sir.

Q. 58. Was that satisfactory to you to make the deed to Mr. Rogers under those circumstances?

A. I believe I made out a deed or either a deed was made out. I don't remember which it was. It was made out by Mr. Chitten-

den or *whether* it was made out here and forwarded — Mr. Rogers' acceptance.

Q. 59. Did you understand that it was in consummation of your contract with Mr. Bacon?

A. Well, I understood, as I said, that he would—that Mr. Rogers assumed all the responsibilities and would hold me harmless from the contract. What deal he had with Mr. Bacon or Mr. Hennessy or anything of that kind I know nothing of.

Q. —. The consideration was the same $4,600.00 that you had telegraphed you would accept?

A. I think it was. I don't think that Mr. Chittenden wrote me anything in regard to the arrangement with Mr. Bacon or Mr. Hennessy.

Q. 61. State whether or not you understood from your agent or attorney there, Mr. Chittenden, that that was satisfactory to Mr. Bacon.

(Mr. ROGERS:) If he has any letters he had better produce them.

A. I don't remember whether he stated that Mr. Bacon was satisfied with it or not.

Q. 62. What is your best recollection, Mr. Chittenden?

163 A. Well, the best recollection, after having been thinking the matter over, — that he didn't write me anything in regard to whether Bacon was satisfied or not.

Q. 63. Did you ever have any correspondence with Mr. Rogers directly?

A. No, sir; not that I remember of; I am pretty sure I would remember it if I had had.

(Mr. ROGERS:) I never spoke to you or wrote to you; I will say that.

Q. 64. This business was entirely conducted through your agent up there?

A. Through my attorneys; yes.

Q. 65. This deed to Mr. Rogers was subsequent to your telegraphing this acceptance of the Bacon transfer, was it?

A. That is my impression, but I am not positive in regard to that; don't remember the date of the letter; I kept no copies of letters, but it seems to me it was after that transfer from Bacon that the deed was made to Mr. Rogers.

Q. 66. At the time you received that letter of September 12 from E. S. Chittenden, did you know Mr. Rogers or had you ever heard of him?

A. I think not; I think it was subsequent to the date of that letter.

Q. 67. In 1882, I think you said, or at least you hold in your hand a letter from E. S. Chittenden, do you?

A. Yes; I believe so.

68 Q. Have you that, too?

A. Have I got it?

Q. 69. Yes.

A. Yes; I believe so; I think I have a letter, but I couldn't tell what year it was because it is blotted.

164 Q. —. I would like to let that go with the other letter in evidence, Mr. Chittenden, if you have no objections.

A. I don't think there is anything in that.

(Mr. ROGERS:) I will just make the objection it is incompetent, immaterial, and irrelevant; I don't know anything about it, but to save the point.

A. I don't remember just what is in that letter. I believe it is July 8th, but what year I couldn't tell. This letter is a letter in which he informs me that——

(Mr. ROGERS:) Better let the letter go right in.

A. Well, if both sides are willing, it is immaterial to me.

(Mr. ROGERS:) Well, of course I put in my objection; I don't know anything about what he wrote nor I don't care about it.

(Letter of date July 8th, 1882, offered in evidence by defendant's counsel and marked "Exhibit B" to the deposition of George N. Chittenden.)

Q. 71. Your telegram accepting the offer in the letter of September 12, 1885, was addressed to Mr. Chittenden, your agent, was it?

A. Yes, sir; I had no communications with anybody else, I believe, in regard to the matter; well, call him my attorney as much as agent.

Q. 72. You had no legal business up there, I suppose?

A. Well, I should regard it——

Q. 73. Aside from this deal in land I mean?

A. No, sir.

Q. 74. He was simply acting for you in this one matter?

A. Yes, sir; that is all.

165 Q. 75. Did he receive the money and forward it to you?

A. Yes; after taking out his fees.

Cross-examination by Mr. E. G. ROGERS:

C. Q. 1. Did you ever receive personally any communication from Mr. Hennessy or any demand from him that you should fix this deal?

A. No, sir; I did not; never saw Mr. Hennessy or had any communication with him until within a few days he came and wanted to know if—said I was to be examined down here, and wanted to know if I would come, and I said I would.

C. Q. 2. As far as you know personally he never demanded that the title should be fixed or corrected?

A. No, sir.

C. Q. 3. Whatever demands were made were made upon your agent?

A. Yes, sir.

C. Q. 4. As far as you know he never made any complaint to you about the title, did he, personally?

A. Never had any communication with him or conversation in regard to the matter, I believe.

C. Q. 5. Never had any communication or conversation with regard to that matter whatever?

A. No, sir.

C. Q. 6. You finally deeded this land, didn't you, to Edward G. Rogers?

A. I did.

C. Q. 7. Did you think when you were deeding that land to Edward G. Rogers you were deeding it to George V. Bacon or David J. Hennessy?

A. No, sir.

C. Q. 8. What paper, if any, did you require before you
166 deeded this land to E. G. Rogers?

Objected to as not proper cross-examination; also that it is not competent for any purpose.

A. I deeded the land after receiving a letter from Mr. Chittenden saying that Mr. Rogers would step in and buy the land and give me a bond of indemnity.

C. Q. 9. To do what?

A. To protect me from any suit or anything—any damage arising from my executing a deed to him in place of Bacon or Hennessy.

(Mr. BROWN:) An objection is made to that answer, and motion to strike it out on the ground that it is a secondary evidence, the letter being the highest evidence as — the instrument itself, and for the further reason that it is not germane to the direct examination, and is irrelevant, immaterial, and incompetent.

C. Q. 10. You got this bond of indemnity before you gave the deed, didn't you?

A. I don't remember in regard to that. I think that I didn't. I think that Mr. Chittenden sent it to me afterwards.

C. Q. 11. That is what I mean; before you sent the deed to Mr. Chittenden.

A. I think that——

C. Q. 12. You trusted Mr. Chittenden to do the business for you there?

A. Yes; I did, entirely.

C. Q. 13. To receive the bond?

A. Yes, sir.

C. Q. 14. When the bond came to you what other papers came with it?

(Mr. BROWN:) This is all objected to as not germane to the
167 original examination and as incompetent and irrelevant.

C. Q. 15. The old deed?

A. I think the old deed was sent back together with the draft and accompanied with a letter from Mr. Chittenden.

C. Q. 16. And you afterwards got the bond through Mr. Chittenden?

A. I think he sent the bond at the same time.

(Mr. BROWN:) The same objection to the questions and answers.

C. Q. 17. Have you got the bond with you?

A. I have.

C. Q. 18. Let us see it, please.

A. There is the bond right there.

C. Q. 19. Let the commissioner mark it. (Paper shown witness.) Is that the bond?

A. Let me look at it again. That is the bond, I believe. Yes; that is the bond from Mr. Rogers to me, sent to me by Mr. Chittenden.

(Mr. ROGERS:) I want the commissioner to mark it so as to identify it.

(Mr. BROWN:) The bond is objected —, first, because it is not germane to the direct examination and, second, that it is irrelevant immaterial, and incompetent, and not proper evidence in this case, and for the further reason that the proper foundation has not been laid.

(Mr. ROGERS:) I will offer the bond in evidence and ask to have the commissioner identify it as being the paper which he says is the bond.

168 (Mr. BENNITT:) I will mark it "Exhibit C."

C. Q. 20. Are you willing, Mr. Chittenden, that this bond shall be attached to this your deposition and become a part of the record if it is safely kept filed in the United States court?

A. I should prefer to have a copy taken of it and I retain the bond.

C. Q. 21. Well, of course, it is for you to say. You prefer to have a copy taken of it?

A. Yes, sir.

C. Q. 22. In other words, then, I am to understand that you would not like to have it attached?

A. I would not like to have it sent away; no, sir; it has not been recorded; if it had been recorded I would just as soon you would have it as not.

C. Q. —. You would prefer to have a copy made?

A. Yes, sir.

(Mr. ROGERS:)

C. Q. 24. Let it appear on the record, then, that you are willing that a copy should be made.

A. Perfectly willing, sir; no objection on my part.

(Mr. ROGERS:) Let it appear upon the record that the commissioner taking this deposition is hereby requested to have a copy of the instrument made and attached to and made a part of this deposition.

It is agreed between the parties that the formality of the witness signing the deposition after it is written out and reswearing to it may be omitted without objection on either side, and that a
169 copy of the bond may stand in the place of the bond and have the same force as if the original had been introduced, subject to defendant's objections, the same as if the original had been offered.

C. Q. 25. How much, really, Mr. Chittenden, was the consideration which I, Edward G. Rogers, paid you for that property?

A. To the best of my recollection it was $4,600.00.

C. Q. 26. Was not it $4,700.00?

A. It might have been.

C. Q. 27. Well, don't you recollect what the deed stated? It was just what was stated in the deed.

A. No, sir; I don't. I suppose it was. I don't remember what it was in the deed.

C. Q. 28. Well, it was nearly $4,800.00, really.

A. I don't know but to the $4,600.00 was added the taxes that I paid; I rather think it was.

C. Q. 29. Then the consideration was just what — really stated in the deed?

A. I believe it was.

C. Q. 30. And don't you recollect it was something over $4,700.00?

A. I can't; I don't remember.

C. Q. 31. In addition to the amounts that was stipulated in the Bacon contract I also paid the taxes?

A. I included taxes, too, I believe.

C. Q. 32. In addition to the amount stipulated in the Bacon —?

A. Well, yes, there was a certain amount that was over and above the stipulation in the Bacon matter as taxes and also in lieu of interest. I believe Bacon declined to pay interest, but finally offered to pay $4,600.00, I think.

170 C. Q. 33. You were perfectly willing to sell to me if I would protect you and pay you this sum?

A. Yes, sir.

C. Q. 34. Which I did?

A. Yes, sir.

C. Q. 35. And that is what you did, too, isn't it?

A. Yes, sir.

C. Q. 36. And you understood the deed was going to me?

A. Yes, sir; it was made to you, according to my recollection.

C. Q. 37. You never had any communication from me either by letter or oral?

A. No, sir; never saw you until I saw you here to-day; never had a letter from you or wrote you a letter according to my recollection.

C. Q. 38. Now, Mr. Chittenden, haven't you been trying and anxious ever since this contract was made in 1882 to have this matter closed out?

A. Yes, sir.

C. Q. —. And you never could get Mr. Bacon and Mr. Hennessy to agree?

A. Mr. Chittenden informed me that he couldn't.

C. Q. 40. And as a matter of fact they didn't anyhow?

A. No, sir.

C. Q. 41. Then, as I understand you, Mr. Chittenden, the consideration of the sale which you made to me was entirely different, or was somewhat different, from the consideration of the sale in the Bacon contract?

A. Yes, sir.

C. Q. 42. And the terms were different?

A. Yes, sir; it was a cash sale. I think in the Bacon contract it was partly on time.

C. Q. 43. You would have been willing to have sold the
171 lands to anybody if they had paid you that sum and indemnified you, would you?

A. Yes, sir.

C. Q. 44. You didn't care who?

A. It was immaterial to me who did it if I got the money.

C. Q. 45. But you wanted the thing closed out and wound up?

A. Yes, sir.

C. Q. 46. This telegram which you say you sent was in answer to this letter of September 12, 1885?

A. Yes, sir.

C. Q. 47. That was, that you was willing to take $4,600.00, as I understood you?

A. $4,600.00 and taxes.

C. Q. 48. But you didn't make any deed to me, did you, finally until some time in November?

A. I think it was about two months after. My recollection is about two months before the thing was accomplished.

C. Q. 49. And the deed was made to me?

A. Yes, sir.

Redirect examination by Mr. BROWN:

R. D. Q. 1. You deeded to whomsoever your agent, Mr. Chittenden, up there, directed you to?

A. Yes, sir.

R. D. Q. 2. And you never had any communication with any of these parties?

A. No, sir.

R. D. Q. 3. Excepting through your agent, Mr. Chittenden?

A. No; with Mr. Bacon, Mr. Hennessy, or Mr. Rogers.

R. D. Q. 4. What took place between them up there you know nothing at all?

172 A. No, sir; only the letters that I received.

GEORGE N. CHITTENDEN.

Subscribed and sworn to before me the 15th day of October, A. D. 1887.

FRED. BENNITT,
Notary Public.

[SEAL.]

173 United States Circuit Court, District of Minnesota.

EDWARD G. ROGERS and GEORGE V. BACON, Plaintiffs,
vs.
DAVID J. HENNESSY, Defendant.

To Rogers & Hadly, plaintiffs' attorneys:

Take notice that on the 14th day of October, A. D. 1887, at No. 107 South Ottawa street, Joliet, Will county, State of Illinois, before Fred. Bennitt, a notary public in and for said county and State, at ten o'clock a. m. of said day, the defendant above named will proceed to take the deposition of George N. Chittenden, a witness for defendant, whose testimony is necessary in this cause, and who resides at Plainfield, Ill., and more than one hundred miles from the place of trial of said action, and that said George N. Chittenden will then and there be examined *de bene esse* on the part of the defendant before said notary public according to the rules of court and acts of Congress in such case made and provided, at which time and place you are notified to appear and take such part in said examination as you may be advised and as shall be fit and proper.

Yours, &c., H. C. McCARTHEY,
Solicitor for Defendant.

Dated St. Paul, Oct. 8th, 1887.
To Rogers & Hadly, solicitors for complainant.

174 STATE OF MINNESOTA, *County of Ramsey*, } *ss:*

H. C. McCarthy, being duly sworn, deposes and says that on Saturday, the 8th day of October, 1887, at Saint Paul, Minn., he personally served the within and foregoing notice and writing on Mr. Hadly, one of the firm of Rogers & Hadly, the solicitors for complainant in the above-entitled case, by delivering to said Hadly a true copy thereof, at the office of Rogers & Hadly, the complainant's solicitors, in Saint Paul, Minn.

H. C. McCARTHY.

Subscribed and sworn to before me this 10th day of Oct., 1887.
[NOTARIAL SEAL.] EMERSON HADLY,
Notary Public, Ramsey Co., Minn.

(Due and legal service — within notice is admitted this 8th day of October, 1887.)

175 EXHIBIT "B" to the Deposition of G. N. Chittenden. Fred. Bennitt, Notary Public.

ST. PAUL, MINN., *July* 8, 1882.

Geo. N. Chittenden, Esq., Plainfield, Ills.

DEAR SIR: Yours of 27th ult. was delayed several days in reaching me.

I have awaited writing you for the reason that I have expected from day to day to learn just what will be required or done in regard to the purchase of the lands.

Bacon has sold his interest under the contract to one Hennessy, who tendered me, June 27th, $4,400 under the contract. I, of course, did not then have the deed and the tender was made merely to preserve Hennessy's rights. I simply admitted that it was a legal tender, without prejudice to your rights under the contract.

At request of Hennessy I let him have the abstract of title, on which he was to let me know his determination within a few days. I have not since heard from him, although I have informed him that I have rec'd the deed.

Your deed names the consideration $4,600. The contract which, at my request, Bacon showed me names it as $4,400. The tender made me was $4,400. How does this difference occur? Is it a mistake in the deed or in the contract? Please inform me at once, as, of course, I could not deliver the deed, if Hennessy is ready for it, until I hear from you.

176 As soon as Hennessy determines I will let you know and close the matter up as speedily as possible.

With kind regards to yourself and family, I remain,

Yours resp'y, E. S. CHITTENDEN.

177 EXHIBIT "A" to the Deposition of G. N. Chittenden.
Fred. Bennitt, Notary Public.

ST. PAUL, MINN., *Sept.* 12, 1885.

Geo. N. Chittenden, Esq., Plainfield, Ills.

DEAR SIR: I have just returned from an interview with Mr. Bacon relative to settlement of your land deal with him.

The consideration named in your deed is $4,600. Interest on this consideration, with taxes paid by you, would make it now amount to about $6,000.

Sanborn has done whatever he could by securing a deed from one of those who conveyed through power of attorney which does not appear of record (I do not recall the name) and placing patent on record to fortify his claim under the mortgage; but I hardly think that even he expects to hold it. He will, however, fight for what he can get. The property is worth considerable more than when you gave Bacon his contract. How much more I cannot now tell without inquiry.

I have tried to get Bacon to pay interest and taxes, but he declines to do it.

He, however, now authorizes me to make you two propositions for immediate settlement.

1st. He will pay the consideration named in the deed, $4,600 (the contract says $4,200), and all taxes paid by you, without in-
178 terest on either contract price or taxes, and will, at his own expense, bring an action to quiet title; or,

2nd. He will pay the consideration of the deed, taxes, and interest

on your bringing and prosecuting to a successful decree an action to quiet title.

He, of course, claims at all times to have been ready to pay the contract price and to perform his part of the agreement, and that the reasons why it has not been closed have been on account of defects in title. At the same time he says now that he will deal with Hennessy as well as Sanborn.

The suit to quiet title is likely to last some time, and, in order to end the matter with Bacon, it is perhaps advisable to accept his first proposition. He says that he wants to know by Tuesday.

Please, therefore, telegraph your answer to this, giving (if you accept the first proposition) the amount of taxes paid, so that I can close with him. You can also by telegraph or subsequent letter instruct me as to how and where you want money sent.

The Bacon contract says nothing about interest. If he can show that he has been ready to pay on good title being made him he probably would not have to pay interest.

Yours resp'y and in haste, E. S. CHITTENDEN.

179 Know all men by these presents that Edward G. Rogers, of the city of Saint Paul, county of Ramsey and State of Minnesota, is held and firmly bound unto George N. Chittenden, of Plainfield, Will county, State of Illinois, in the sum of ten thousand ($10,000) dollars, lawful money of the United States of America, to be paid to the said George N. Chittenden, his executors, administrators, or assigns; for which payment, well and truly to be made, he binds himself, his heirs, executors, and administrators, firmly *of* these presents.

Sealed with his seal and dated the fourth day of November, one thousand eight hundred and eighty-five (1885).

The condition of the above obligation is such that whereas the said George N. Chittenden did, on or about the 29th day of March, A. D. 1882, make and enter into a contract for the conveyance and sale of certain real estate situate in the county of Washington and State of Minnesota unto George V. Bacon, which real estate is described as follows:

The southeast quarter (S. E. ¼) and the east half (E. ½) of the southwest quarter (S. W. ¼) and the northeast quarter (N. E. ¼) of the northwest quarter (N. W. ¼), all in section thirty-one (31), of township twenty-nine (29) north, of range twenty-one (21) west, according to the United States Government survey thereof, in which contract time was made the essence thereof; and whereas said Bacon did thereafter assign or transfer unto one David J. Hennessy

180 some interest in said contract; and whereas said George V. Bacon and David J. Hennessy have not and neither of them has fulfilled the conditions of said contract, and said George N. Chittenden has annulled the same and has sold and conveyed said property to said Edward G. Rogers: Now, therefore, if said Edward G. Rogers shall well and truly indemnify and protect said George N. Chittenden, his heirs, executors, administrators, or assigns, from any and all claims and demands made or to be made by said George

V. Bacon and said David J. Hennessy or either of them under or on account of said contract, and shall in all respects indemnify and save harmless the said George N. Chittenden from any loss or damage by reason or on account of said conveyance to said Rogers and from all expenses of litigation arising thereunder and on account of said contract with said Bacon and on account of litigation with one John B. Sanborn or any other parties now represented by him to clear and perfect the title to said property or any part thereof, then the above obligation to be void; otherwise to remain in full force and virtue.

EDWARD G. ROGERS. [SEAL.]

Sealed and delivered in presence of—
C. S. ROHRER.
E. S. CHITTENDEN.

181 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Edward G. Rogers came personally before me on this 4th day of November, A. D. 1885, to me well known to be the same person who executed the foregoing bond, and acknowledged the same to be his own free act and deed.

C. S. ROHRER,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

182 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Edward G. Rogers, being first duly sworn, doth say that he is the same person above named, and is a resident and freeholder of and in the State of Minnesota and worth the sum of ten thousand dollars above his debts and liabilities and exclusive of his property exempt from execution.

EDWARD G. ROGERS.

Subscribed and sworn to before me on this 4th day of November, 1885.

C. S. ROHRER,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

183 United States Circuit Court, District of Minnesota.

GEORGE V. BACON and EDWARD G. ROGERS }
vs.
DAVID J. HENNESSY. }

STATE OF ILLINOIS, } ss:
Will County, }

I hereby certify that on the 14th day of October, A. D. 1887, before me, Fred Bennitt, a notary public in and for the county of Will and State of Illinois, at my office, No. 107 South Ottawa street,

in the city of Joliet, county of Will and State of Illinois, personally appeared, pursuant to the notice hereto annexed, at the hour of ten o'clock a. m., George N. Chittenden, the witness named in said notice, and Edward G. Rogers, Esq., appeared as counsel for the plaintiffs and C. W. Brown, Esq., appeared as counsel for the defendant; and the said George N. Chittenden, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears from the deposition hereto annexed.

And I further certify that the said deposition was then and there reduced to short-hand by C. A. Strong in my presence, and was afterwards transcribed in type-writing by him and afterwards read over to the witness, subscribed and sworn to by him, and the same has been retained by me for the purpose of sealing up and di-
184 recting the same to the clerk of the court, as required by law.

And I further certify that the reasons why said deposition was taken were that the said witness resides at Plainfield, Will county, Illinois, more than one hundred miles from the city of St. Paul, Minnesota, the place where this cause is to be tried.

And I further certify that I am not counsel or attorney to either of the parties, nor am I interested in the event of the cause.

I further certify that the fees for taking said deposition, $12.40, have been paid to me by the defendant; the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal, in the city of Joliet, county of Will and State of Illinois, this 15th day of October, A. D. 1887.

FRED BENNITT,
Notary Public.

[NOTARIAL SEAL.]

Indorsed: Filed Oct. 20, 1887. Oscar B. Hillis, clerk.

185 United States Circuit Court, District of Minnesota.

GEO. V. BACON & EDW'D G. ROGERS
vs.
DAVID J. HENNESSY.

Testimony on Rebuttal.

SATURDAY, *Nov.* 19, 1887.

Parties met by agreement at the office of Mr. H. C. McCartey at 2 o'clock p. m.

R. T. O'CONNOR, being first duly sworn, testified on behalf of the defendant as follows:

Direct examination by Mr. LAWLER:

Q. You are the clerk of the district court for the county of Ramsey, State of Minnesota, are you?

A. Yes, sir.

Q. Do you hold in your hand the file in the case of D. J. Hennessy *et al. vs.* A. M. Torbet?

A. Yes; file No. 23229.

Q. Do you find among the files this enclosed mortgage?

A. Yes; the mortgage of Tim. R. Cresy, filed in the office on the 8th day of May, 1886.

(Introduced in evidence and marked Defendant's Exhibit 1.)

Q. I call your attention to this enclosure.

A. That is the complaint of David J. Hennessy against A. M. Torbet.

(Introduced in evidence and marked Exhibit 2.)

WITNESS: That was filed the same day.

Both papers received without objection.

D. J. HENNESSY, def't, sworn in rebuttal on his own behalf, testified:

186 Direct examination by Mr. LAWLER:

Q. I call your attention to Mr. Hadley's evidence. He is asked on his cross-examination, "What, if anything, was said or agreed upon between them in relation to a certain hundred dollars that Mr. Hennessy had paid to Mr. Bacon on account of this land?" The answer is, "The understanding was that the time the deeds were passed that the hundred dollars which he had paid to Mr. Bacon was deducted from the amount which Mr. Hennessy was to pay Mr. Rogers." Was that the understanding?

A. No, sir.

Q. Explain what the understanding was.

Objected to as not rebutting, and has gone over that entire ground.

Q. Is that statement of Mr. Hadley's true?

A. No, sir; it is not.

Q. State what the understanding was.

A. The understanding was that I was to pay Mr. Rogers $2,750 for his deed, and that I was to give him a quitclaim deed to a half interest in the land and he to deed me a half interest in the land. My deed to him was without money consideration. A money consideration was mentioned in my deed to him, but there was no money consideration passed. I was to deduct some moneys I had advanced to Mr. Rogers for payment of recorder's fees in Washington Co. and in part payment of taxes on the lands—payment of half the taxes on the lands—and $1.00, I think, for railroad fare to and from Stillwater—in all about $18.

Q. Do you remember the amount of the check which you gave on the basis of that understanding?

187 A. My check was for $2,732.

Q. Just please state the items which, subtracted from

$2,750, make the amount of that check in pursuance of the agreement.

A. $4.70 recording fees, $12.27 taxes, $1 R. R. fare, making $17.97. That is within three cents of the amount of the check; 3 cents were omitted from the check.

Q. Have you the receipt for the recording fees and the tax receipt with you?

A. I have, sir.

Q. Were they accepted at the settlement in Mr. O'Brien's office?

A. They were, sir.

The receipts are offered in evidence and marked Exhibits 3 & 4.

WITNESS: It is a duplicate tax receipt. I took the receipt in duplicate—that is, a duplicate of the original receipt.

Q. Have you the check you gave at that time, $2,732?

A. I have not the check, but I have the amount on the stub.

Q. Have you searched for the check and not been able to find it?

A. I made some search and have not been able to find it. I think it is likely in Dubuque.

It is admitted on the part of the plaintiffs that from the $2,750 there were some items deducted, which left the balance a small amount less than $2,750.

Copy of stub offered in evidence.

Date (printed), Ap'l 7th (written), 188 (printed) 6 (written), $ (printed), 2,732.00 (written). Pay to (printed), Edward G. Rogers (written), or order (printed). That is the entire stub, except the letters "No." at the head.

Mr. MCCARTEY: That is your check book and a stub found in the check book that you ordinarily use?

188 A. It is the check book I used at that time. When one is used up I get a new one.

Q. You keep that as a memorandum of the checks you give?

A. Yes.

Q. I call your attention further to Mr. Hadley's testimony. In answer to Q. 18 Mr. Hadley testified that you were to give Mr. Rogers a quitclaim to one-half, and Mr. Rogers was to put certain papers he had upon record at that time, and Mr. Hennessy was to release Mr. Bacon and Mr. Chittendon from all claims he — against them. Is that true?

A. At the time of the deeds there was nothing of that kind. The contract made no provision for and no mention whatever of the recording of any papers. Prior to the passage of the deeds and subsequent to the signing of the contract, papers (7 papers, I think) were given me by Mr. Rogers to be recorded; the ones I have already referred to; those mentioned in the receipt. These have been recorded at the time, and I had to produce the receipt to show cost of recording them at the time of the transfer of the deeds.

Objected to.

WITNESS: "To release him from all claims"—that was in the

contract, or some general expression of that kind, which I refused to sign, and a change had been made limiting the claims. Originally there was nothing said at all—that is, at the verbal settlement under which this written contract was made there was nothing said at all about releasing Bacon & Chittenden from all claims. The first allusion or reference to that I knew of or heard was when it was incorporated by Mr. Rogers in the contract. It had
189 never been mentioned between us before. When it was read from the contract I objected.

Plaintiffs object to all this testimony as not rebuttal.

WITNESS: But finally I assented to it in a limited form—a qualified form.

Q. Was Mr. Hadley present when this verbal agreement was made between you and Mr. Rogers?

A. He was not. He was never present at any interviews or conversation between me and Mr. Rogers or at any settlement between me and Mr. Rogers.

Q. When the deed from Mr. Rogers came who notified you of its arrival?

A. I think John D. O'Brien. I knew nothing of Mr. Hadley's connection with the matter till I met him in Mr. O'Brien's office. The arrangement between myself and Mr. Rogers in Mr. O'Brien's office was that the transfer of the deeds was to be made through Mr. O'Brien, who held the contract when I presented my deed. Some objection was made by Mr. O'Brien to the form of it. It was not in the usual form; it was a form I had written. I think we referred the matter to Mr. Hadley, and Mr. Hadley thought it was all right.

Q. Mr. Hadley states here that from the conversation he had with you at the time the deeds passed he understood the hundred dollars was to be allowed. Did you have any such conversation with him there?

A. The hundred dollars to Mr. Bacon?

Q. Yes.

A. No, sir; I made no such statement; had no such conversation with Mr. Hadley. It was simply the payment of $2,750, the consideration in Mr. Rogers' deed.

190 Q. Do you remember when it was you got the deed from Mr. O'Brien?

A. The deeds passed, I think, on the 7th of April, 1866, the date of my check. My check was drawn at that time.

Q. Mr. Hadley testified as follows, A. 24:

That he learned from the conversation with you at that time that you had paid Mr. Bacon this $100, and that Mr. Rogers was to look to Mr. Bacon for that money, and that that was the agreement between you and Rogers.

A. I made no such statement.

Q. Was there any such agreement?

A. There was not, nor was the hundred dollars to Bacon mentioned at all in one way or another at that settlement—that is, at that transfer—except in reference to the consideration in my deed.

Q. There was some testimony by Mr. Chittendon about a Mr. Kavanagh having been instructed to call on him by you?

A. There was a gentleman in the city here at that time, who has since died, by the name of Frank W. Kavanagh—he was engaged in the real-estate business—whom I requested to call on Mr. Chittendon in reference to the troubles on the title to the land in question.

Q. Do you know whether or not he called on Mr. Chittendon?

A. First, I wish to say that I directed him to tell Mr. Chittendon to call on Mr. Horn. Mr. Kavanagh informed me he had called and seen Mr. Chittendon. I couldn't say when he called.

Q. You yourself called several times on Mr. Horn in relation to straightening up the title, didn't you?

A. Yes; I called on him several times—I don't know how often—in reference to this matter, because in calling on other matters I might speak to him about this. I spoke repeatedly on the subject. He told me——

191 Anything Mr. Horn said is objected to.

WITNESS: Invariably he told me that the two objections he raised to the title were material.

Q. Mr. Rogers in Ans. 16 testifies as follows:

"I first met Mr. Hennessy after I had purchased this land from George N. Chittendon—I think some time about the last of December, 1885, or it might have been the 1st of January, 1886—after I had written this letter to which he has made no answer. I met him somewhere on the street, near the Merchants' Hotel. We had some conversation that didn't amount to anything. I don't recollect what it was, but I think the first conversation I had with Mr. Hennessy in relation to this land was when he came into my office with Mr. McCartey in response to some letters that I had written to talk matters over." In response to what letters was it that you went in and had that conversation?

A. I didn't go in response to any letters. I went in pursuance of an appointment made that afternoon that Bacon assaulted me on the street. It was agreed between myself and Mr. Rogers that we would meet at his office at 10 o'clock the following morning, and before I went into his office I called on Mr. McCartey and asked him if he would accompany me, and he did. That was on the morning of the 18th of March, the very day of the settlement. The assault took place in the afternoon of the 17th of March.

Q. Mr. Rogers testifies that at that interview the following conversation took place:

"Q. Did he or did he not in that conversation deny your having any right to the land?

Ans. Yes; he always insisted I had no right to the land; took the same position in all the conversations that he did in his
192 letter—that any claim I had was simply a cloud on the title."

Just state what your conversation was with Mr. Rogers in regard to what your position was in that interview, as you expressed it to him.

Objected to, that it has all been gone over before by this same witness.

A. That interview was arranged for the purpose of trying to reach a settlement of the differences between myself and Mr. Rogers, which had become specially aggravated by the assault of the evening before. At the interview I insisted on the rightfulness of my claim under the Chittendon-Bacon and Bacon-Hennessy contracts. Mr. Rogers insisted on his claim under the Chittendon-Rogers deed, and claimed that even if that claim could not be sustained he could claim under the Sanborn mortgages or assignments which he purchased, and also under some instruments affecting a forty acres of the land. He insisted that these were good as against the land anyhow. I told him as to our relative positions on the subject in these matters no change was likely to be made. He would not admit my position and I was not prepared to admit his, but that I would make him a proposition, and I did make him one, the first I ever made. He argued some against it, but took until noon to consider. That proposition was to the effect that I would pay one-half the amount I had stipulated to pay Bacon for the land and take a half interest; give him a half interest and retain a half interest. I would take a half interest and pay half what I had agreed to pay Bacon, the payment to Bacon to be credited, in that proposition, and, as I say, he took until noon, and was to give me his answer at noon or in the afternoon, and he saw me in the afternoon
193 at Mr. Martin's office, 145 East 5th St., at which time he stated he didn't think my offer was enough—not fair; that he had paid out considerable money, and that I ought to make him a better proposition. As I recollect, I think he claimed he had paid $5,700, $4,700 to Chittendon and $1,000 to Sanborn. There was a good deal of talk after that, and I made him some other propositions. I made him a proposition of $2,450, one of $2,500, and, finally, a final proposition of $2,750, which was absolute, the last thing I would do. I had made him another proposition just before that, and was leaving the office, when he called me back, and finally I made the proposition of $2,750, and immediately on my making that proposition he accepted it, and we left the office to have it put in writing, he saying that he would go to any office or any attorney with me. I proposed going to Mr. Horn's office, and he objected to that and proposed going to Mr. O'Brien's office, and I consented to that.

Q. Mr. Rogers testified that one of the considerations of that agreement was that he was to bring suit to satisfy the Cressy mortgage without cost to you, and that he was to give you all the papers he had from Sanborn, and you should put them on record. Was that so?

A. That was no part of our agreement. Our agreement had no reference to anything except the money I was to pay and the interest I was to get and the interest he was to get. These other things were entirely outside of our agreement—that is, they were beside it; subsequent additions, but not part of the agreement.

Q. Were they mentioned at all?

A. Not mentioned at all until in Mr. O'Brien's office. The papers were given me after the execution of the agreement. The papers were not given to me as part nor made a part of the execution of the agreement. They were produced and given to me after
194 the execution of the agreement, and for the sole purpose of putting them on record. As I was leaving, he stated to me that he intended leaving that very night for Kansas City, but he didn't go that night, for I saw him on the street the next day, riding with Bacon.

Q. Did you know anything at all of those papers having anything to do with the contract?

A. I did not.

Q. Was the Cressy mortgage mentioned at all in Martin's office?

A. It was mentioned and referred to as a basis of his claims. It was not mentioned in the sense that I was to put it on record or his saying anything of that kind. It was mentioned as a basis of his claim.

Q. Do you know anything at that time as to the condition of that mortgage—as to its being satisfied?

Objected to as not rebuttal.

A. I did not. The only knowledge—I don't call it knowledge—information I ever had regarding it was what I saw in the abstract and a statement made me by Mr. Bacon in or about June, 1885. Mr. Bacon, in the conversation with him at his office about June, 1885, stated to me that he had some evidence of the payment of that mortgage, and that if I would release my claim on the land and let him take the land that he would get rid of Sanborn and make it hot for him; too hot for him, I think his language was. That was the time, I think, he told me he would beat me out of the land if he could.

Q. That was the time he stated he had some evidence?

A. Yes; he stated he had some evidence in regard to the payment of the mortgage, but would not use it for my benefit.

Q. When did you first see the evidence regarding the payment of that mortgage?

195 A. I never saw it until the testimony was commenced to be taken in this case, when I saw it on file in the clerk's office. That was the first time I ever saw the mortgage and the first time I ever knew of its contents—that is, outside of the record; the first time I ever knew of the assignment or anything else or endorsements on it—at the time of my interview with Mr. Rogers.

Pl'ff objects to witness testifying now in regard to anything not asked of him at all.

Mr. LAWLER: Is this in response?

A. Yes, sir. At the time of my interview with Mr. Rogers in his private office I referred to that statement made to me by Mr. Bacon as against his claim under the Sanborn mortgage, and he denied that there was any such evidence in existence or that he knew of

any, and he didn't care what Bacon told me; that his claim under the mortgage was good, and if it wasn't he wouldn't have paid Sanborn the price he had paid; that he knew what he was doing when he paid Sanborn the $1,000, or words to that effect.

Q. Mr. Rogers testifies that you didn't want to sign the contract discharging Mr. Bacon from all claims of any nature; that you objected to releasing him from all claims of any nature; that you agreed to it as to the dispute about this land, but "there was this personal altercation, I suppose he referred to." What was the ground of your objection on this score, as stated to Mr. Rogers?

A. As I have before testified, I objected to it wholly for the reason it was entirely new; it hadn't been discussed between us. I hadn't heard or read of it until, as I say, it was read in the contract. It was no part of our agreement first, and I objected to it, sec-
196 ondly, in the general way in which it was expressed, and Mr. Rogers qualified it and urged that it was a settlement of all matters between Bacon & Chittendon; I might as well sign it, and I did sign it in a restricted way. That is all that is to that.

Q. I wish to ask again a question with regard to this hundred dollars. Mr. Rogers testifies: "At the time I had the talk in Hennessy's office, before we went over to draw this agreement, it was understood he was to pay me $2,850, but in that $100, to make up the $2,850, was to be the assignment of the $100 claim, which he said Bacon was indebted to him by reason of his paying one hundred on that contract. He offered to give me a written assignment, and I said, No; I don't care about a written assignment; I am satisfied with a verbal assignment." *Q.* Do you know what that was?

Objected to that that has been gone over four or five times on direct and on cross examination.

Q. Do you know what Mr. Rogers' language was?

A. At our settlement or agreement that was not the fact. It is a fact that the $100 was mentioned during the interview, because, as I have stated, I made Mr. Rogers several propositions running up from $2,350. My proposition in the morning, which included this $100—the $100 was referred to in connection with that proposition—the $2,350 and the $100 I had paid Bacon, which was half what I had stipulated to pay Bacon—I made then, as I have stated, propositions running from that upwards till the final proposition, which had nothing to do with Bacon, which was $2,750, and when I made that proposition I told Mr. Rogers I would make no other proposition; that was my last, my ultimate, proposition; if not accepted, I would make no other. Mr. Rogers accepted that proposi-
tion immediately it was made; said he would take it. That
197 is all there was then. There was no question then about this $100. I may state, further, here, in regard to this whole question of the $100, that after I had signed the contract in Mr. O'Brien's office—no question before signing it—but after I had signed the contract in Mr. O'Brien's office I said to Mr. Rogers that perhaps he might get the hundred dollars from Mr. Bacon, and his answer was, "Bacon's hundred dollars be damned. I don't care for

it." That is exactly what he said—"I have nothing to do with that." That, as I say, was after this agreement. I preferred Mr. Rogers should have the hundred dollars rather than Bacon, but he rejected that.

(Recess here taken till 7.30 p. m.)

Q. Mr. Rogers testifies in Ans. 46 as follows: "After my return from California (I could give you the exact date by referring to the complaint) I drew up the complaint brought by David J. Hennessy, Edw'd G. Rogers, and Geo. V. Bacon against Torbet, and took it to Mr. Hennessy, at his office, and said, Mr. Hennessy, I am now ready to bring this suit to settle the matter of the Cressy mortgage. I have transferred a quarter of this land to Geo. V. Bacon, and I don't care to bring this suit for these three parties without bringing in the names of the parties involved; so if it meets your approval we will bring it in this way. He had already told me I could bring suit in his name. Mr. Hennessy said, 'All right,' and I brought suit and got the mortgage cancelled." Is that true?

A. No, sir.

Q. State the fact as it occurred, then.

A. There is no fact to it; it is fiction. Mr. Rogers
198 didn't come to me and make any such statements as are contained in that answer. He didn't present the complaint to me, and I never read the complaint until I read it on the files with the clerk of the court since the testimony was commenced in this case. I never knew what that complaint contained. I never knew that G. V. Bacon was ever associated in any suit brought in my name and in Mr. Rogers' name. I never knew of any ¼ interest or any other interest in G. V. Bacon in this land until I heard it from Mr. Rogers that he had sold his interest to Mr. Bacon, and that Mr. Bacon wished a partitioning of the property, and he asked me if I would consent to a partition, and, if so, to say what division I wished. That was in August or Sept., 1886. I never knew either until after this suit was commenced that the suit to which I gave consent for the use of my name involved the Moore-Cressy mortgage. It is true that at the time of the signing of the contract I did give Mr. Rogers permission to use my name in connection with some suit in regard to some defect in the title, but there was no mention of the Moore-Cressy mortgage or of the Sanborn mortgage. I wouldn't have known the name, but at that time I was given to understand it was some small mortgage involving about $100, and I didn't know there was any trouble or difficulty in regard to the Sanborn mortgage, because I supposed that Mr. Rogers held that, as he claimed that he had all that interest and there was no trouble in regard to that mortgage. I had never heard of any trouble regarding that mortgage except as to whether it had been officially paid or not, and I knew of no necessity of bringing suit in connection with it. He mentioned the name of the party of (against) whom suit
199 was to be brought, but the name was neither Moore nor Cressy nor Sanborn. The name would convey nothing to me, because I knew nothing about the matter from any source, but I un

derstood that he held the Sanborn mortgage all right. That was his claim all along to me.

Q. When did you first understand that Mr. Rogers had conveyed a quarter interest to Bacon?

A. I learned that first from the records in Stillwater. Mr. Rogers, in telling me he had sold to Bacon, did not tell me that it was a quarter interest or anything else; he simply told me he had sold his interest. I did nothing then until I received notice of suit for partition, and after receipt of that notice I went to Stillwater and examined the records there to see how the thing was, and then I found this deed of March 18th; I think the date was that; quitclaim deed executed and acknowledged, I think, in California. It was dated, as I recollect, the same day as my own—the deed to myself; that, I think, was March 18, 1886. The first knowledge I had of that deed was from the records.

Q. When did you first receive the notice from Rogers that he had transferred an interest to Bacon?

A. The first intimation I had in regard to that was, as I stated, somewhere in the latter part of August or the beginning of Sept., 1886; I couldn't be definite as to dates.

Q. That was by letter?

A. No, sir; that was by word of mouth—verbal; but at the same time he addressed me a letter, or about that time, in reference to it, which I received long afterwards.

Q. Have you that letter with you?

A. I have, sir.

(Letter produced, dated Aug. 31, 1886.)

200 Q. Do you remember about when it was that you received it?

A. I made a note in pencil at the time. It is very indistinct, but seems to be, "Received and opened Tuesday, Nov. 23, 1886."

Mr. McCARTEY: That is on the envelope, is it?

A. It is on the envelope. I got this in Dubuque. It had lain there a long time, but my information was not from that letter. I knew it before I got that letter. The knowledge came to me from Mr. Rogers here, in St. Paul.

Q. This letter was addressed to Dubuque?

A. Yes; it was addressed to me to Dubuque and was delayed there.

Q. Can you tell why it was so long before you got it?

A. I cannot, unless because I was away. Many times when in the country letters lie over, and persons write me that they wrote when I did not receive the letter. The letter reads in this way: "Rogers & Hadley" is in red letters on the top across the words Edward G. Rogers, printed. On the left-hand margin are the two letters V. S.—what they signify I don't know—P. O. box 2344. On the upper right-hand side, "St. Paul" (printed), Aug. 31 (written), 188 (printed) 6 (written).

David J. Hennessy.

DEAR SIR: I have sold to Geo. V. Bacon my interest in the Washington Co. land. Mr. Bacon wants this land divided at once, and unless you can agree it must be left to referees appointed by the court. Let us hear from you at once.

"Yours, &c., ROGERS & HADLEY."

201 The envelope is postmarked "Dubuque, Aug. 31, 1886, 7 p. m." On the left-hand upper corner of the envelope is printed, "After 5 days return to Rogers & Hadley, att'ys & counselors at law, St. Paul, Minn." The letter is addressed to "David J. Hennessy, Dubuque, Ia."

Q. Mr. Rogers says, in the same answer, that at the time of the settlement it was understood that the contract, when completed by delivery of the deeds and payment of the money, should be given to Geo. V. Bacon as evidence that everything was settled as against him concerning this land. Was that the understanding?

A. There was no such understanding. There was no such use to be made of that agreement, nor would I have assented to any such use had the proposition been made to me.

Plaintiffs move that the last answer be stricken out; that the contract speaks for itself.

WITNESS: I will further add that the fact that it was not delivered to Mr. Bacon after the deeds were passed is itself evidence that it was not to be given to him, and my recollection is that John D. O'Brien held the contract up to about June, 1886, when it was given to me.

Pl'ffs move that the last answer be stricken out as not responsive to any question whatever asked the witness, and is his opinion and nothing else.

Q. Mr. Rogers being asked concerning the Cressy mortgage as follows: "Judge Lusk: Q. I asked if you ever said that that was a valid mortgage; didn't you? Answered. I never did to any living man, no time." State what Mr. Rogers said to you concerning that mortgage, if you remember.

A. Mr. Rogers stated to me and claimed at all our interviews that the Moore-Cressy mortgage which he had bought from Sanborn was a lien on the property, and that the property was respon-
202 sible for that mortgage; that he could hold the property under that mortgage—could hold the property to the extent of that mortgage—and he used it as a lever to secure settlement—the settlement that he did secure.

Pl'ffs move to strike out that part of the answer in which the witness states that Rogers used it as a lever to secure the settlement that he did secure.

Q. Mr. Rogers testifies to having paid Mr. Bacon certain money, the difference between $4,705.87 and $5,000—$294.13. Did you know at any time of the payment of this money?

A. No, sir; Mr. Rogers told me nothing regarding this money nor any connection between himself and Mr. Bacon in securing the title from Mr. Chittendon.

Pl'ffs move to strike out all the last part of the answer as not responsive to the question.

Q. Did Mr. Rogers at any time before the settlement apprise you of his connection with Bacon?

A. In connection with the purchase of this land from Chittendon?

Q. Yes.

A. He did not; but, on the contrary, insisted that there was no connection between himself and Bacon, and that Bacon had no interest in it.

Q. Mr. Bacon testifies, with regard to the objections to the title, as follows:

"He (Hennessy) wouldn't make any objections specifically; he said that they knew and he knew. I told him that was not the customary way to do; that if he had any specific objections he ought to state them to Mr. E. S. Chittendon, and he did not do so. Mr. Chittendon didn't know what the objections were, nor I didn't know. He let the matter stay that way a long time. It was impossible to get any satisfaction out of Mr. Hennessy."

203 Q. State what the statements of Mr. Bacon were in regard to the objections to the title.

A. Mr. Bacon came to see me or meet me several times, as I testified in my direct examination. Most of his interviews appeared to be for the purpose of getting me to surrender my contract. He sometimes asked me to go and see Mr. Chittenden in regard to the troubles affecting the title. Mr. Chittendon knew at the time all the objections that were made by Mr. Horn. Mr. Bacon knew these objections. I had told them to him as they were told to me, but I referred both Mr. Bacon and Mr. Chittendon to Mr. Horn; Mr. Chittendon on the occasion when I met him on 3rd St., and also, I think, by letter. I told Mr. Bacon that no good could come of an interview between myself and Mr. Chittendon. I could do nothing at such an interview, but that they could see Mr. Horn, and if they satisfied him regarding the title I was ready to take it. On the occasion to which I have already referred, in June, 1885, when he claimed to have some evidence going to show the payment of the mortgage, I wanted him to produce that evidence—asked him why he didn't produce that evidence to Mr. Horn, or why they didn't put it on record, or why they didn't go into court and show that evidence and get a decree of the court quieting the title. He told me he didn't propose clearing the title for me; that he would beat me out of the property if he could. That is the gist of that conversation and interview. Mr. Bacon always knew my attitude in regard to the difficulties, and knew what the difficulties were.

Q. Mr. Bacon has stated that you were making endless
204 delays in the matter of closing up. State what your position was with regard to the title at this time.

Objected to as not rebuttal.

A. Mr. Bacon had stipulated to give me a good, clear, and perfect title to that property.

Pl'ffs move to strike out the last answer of the witness.

Mr. McCARTEY: Wait till he gets through.

WITNESS: I had agreed to pay him $500 for his contract under that stipulation, or one of that kind.

Pl'ffs move to strike out that portion of the witness' testimony—as it is all in writing—contained in the written contract. It is not for the witness to state what — was.

WITNESS: I was always ready to fulfil my part of the contract, and desired Mr. Bacon to fill his. He showed no disposition to do so. On the contrary, — seemed only desirous to get me into a position where I might be misrepresented, and my wish was to keep out of such a position. I had, therefore, on all occasions referred them to Mr. Horn.

Pl'ffs move to strike out all of the answer of the witness on the ground that it is nothing but an opinion of the witness and contains not a single fact.

WITNESS: Mr. Bacon knew well that I was ready to carry out my part of the agreement, but Mr. Bacon didn't wish (and so expressed himself) to give me the title, but tried to get me to withdraw from the arrangement and let him take the title to himself, making use of various representations as to his poverty and my wealth, and this, that, and the other; that it didn't amount to much for me, but was considerable to him, and that was the gist of most of Mr. Bacon's interviews with me. He wanted to get me out of it entirely, and on the last occasion we met before his assault on me he told
205 he would beat me out of it if he could.

Pl'ffs now move to strike out all the witness's testimony last stated by him on the ground that it contains no statement of any fact whatever, but is simply a speech of the witness and his conclusions.

Q. Mr. Bacon is asked by Judge Lusk as follows: Q. "After the deed arrived could you get him to go up and make a tender?" Ans. "I couldn't get him to do anything." *Q.* Did Mr. Bacon say anything to you whatever about making any tender after the deed arrived or after tender was first made, June 27, 1882?

A. He did not. I was never asked to make any tender after the tender was first made, June 27, 1882.

Q. Mr. Bacon testifies concerning the conversation in front of the Ger. Am. Bank building as follows: "I don't know of much conversation with him. I will say here that that came up in this way: I had been to see Hennessy repeatedly, and one of the last times I told him just this: Mr. Hennessy, I have been for several years trying to get you to close this contract on this land. I have told you that if you don't do something I will sue you. You don't care anything about a lawsuit. You would just as lief have a lawsuit as not. I have asked you as a gentleman either to take the deed or

throw up the contract. You won't do that either. Now, if you won't do anything I will give you a thrashing." Do you remember the interview he speaks about there? That doesn't refer to the interview in front of the bank, as I understand, but to some other interview.

A. I would infer from reading his testimony that that refers to an interview I have testified to as having occurred in June, 1885.

206 Pl'ffs object to the answer of the witness as not responsive to the question; witness starts out by saying what he infers.

Q. You have heard me read Mr. Bacon's testimony as to a certain interview when he claims — used that language that I have read to you. What actually took place at that interview, as far as you recollect? What did you say and what did Mr. Bacon say?

A. What I have already testified as having occurred at the interview between myself and Mr. Bacon in June, or thereabouts, '85, is true, and what Mr. Bacon represents as said at that interview, as you read it to me, is not correct. It was at that interview Mr. Bacon told me of his having some evidence in regard to the payment of the Moore-Cressy mortgage and his unwillingness to put that evidence on record or clear the title for me. What Mr. Bacon says regarding his trying for several years to get me to close the deal on this land, and that if I didn't do it he would bring a lawsuit, and that I didn't care anything about a lawsuit, would just as lief have a lawsuit as not, and that "I have asked you as a gentleman either to take up the deed or throw up the contract, but you won't do anything," is not true; nor do I remember the words "if you won't do anything I will thresh you."

Q. Do you remember Mr. Bacon going to your room at any time?

A. I do not.

Q. You don't remember the interview he speaks about as having taken place in your room?

A. I do not. I don't remember any interview with Mr. Bacon at any time there.

Q. Do you remember receiving these letters from Mr. Chittendon he has testified concerning? He has testified to three. Do you remember receiving them or any or all of them?

207 A. I likely may have received one of them. I haven't a very distinct recollection regarding it, but there is one of them, the long one, that I have no recollection of having received.

Q. Examine that letter there, dated Nov. 16, '2 (meaning '82), and state whether you ever received that or not.

A. I have no recollection of having received any such letter. I see the letter is dated Nov. 16, '82, and at its head it is addressed to me, D. J. Hennessy, St. Paul, Minn. I may say that during the fall of 1882 I was absent a good deal from St. Paul. I remember distinctly having gone up in the early part of the month of Oct. of that year to settle some matters regarding some real-estate transactions at Grand Forks, and after getting through with them went, I think, to Duluth, to Lake Superior. I can't remember distinctly

when I got back to St. Paul. It may have been considerably after the date of this letter.

—. Mr. Bacon testifies that at the talk you had on the occasion of the assault in front of the German-American Bank you had said nothing concerning the land or concerning your contract with him. Is that testimony true?

A. It is not. I did speak about the land; stopped him specially to speak about it, and it was from the conversation regarding that land that the words arose which ended in blows.

Counsel for pl'ffs objects to the use of poetry by the witness.

Q. Mr. Bacon testified you didn't inform him that Mr. Horn had examined the title for you, and that you never referred him to Mr. Horn in regard to the defects Mr. Horn found in the title. Is that testimony true?

A. No, sir; it is not true.

208 Q. You informed him that Mr. Horn had examined the title for you and referred him to Mr. Horn, did you?

A. I informed him that Mr. Horn had examined the title and referred him to Mr. Horn, and stated to him the objections Mr. Horn had made to the title, and he knew what these objections were and talked frequently in regard to them.

Cross-examination:

Q. Do you think you did not release your claim against Bacon for that $100?

A. In express terms, no; unless it is included in the release in the contract.

Q. Didn't you understand that after settling with Rogers you had no claim on that $100?

A. Well, as I say, that would be indefinite in my mind. I regarded the matter as settled on signing the contract. My understanding was that the signing of that contract and the arrangement I made with Rogers was a settlement of the matter. That was my reason for stating to Mr. Rogers, after signing the contract, that he might get that $100, and he made the answer I have testified to.

Q. Then you don't think after signing the contract with Mr. Rogers you had any claim on Bacon for that $100?

A. I had no intention of pursuing Bacon after signing that contract.

Q. Then you regarded the $100 as released?

A. I regarded that as a settlement of the whole matter.

Q. Or assigned to Mr. Rogers, whichever you prefer?

A. It wasn't assigned to Mr. Rogers. I think the contract made no mention of it. The contract contained a release running

209 to Mr. Bacon and Mr. Chittendon of claims under the contracts. It might be said that was a claim under the contract, but otherwise there was nothing about it. The fact is I regarded the matter as settled, and as far as I was concerned I didn't intend doing anything further either as to Bacon or Chittendon. I con-

sidered the matter as an honest, *bona fide* settlement of the whole transaction. That was the understanding I had at the time.

Q. Then may you not have told Mr. Rogers he could have the $100 against Bacon?

A. I did after the signing.

Q. May you not have told him before the signing?

A. No; at the time the agreement was finished—that is, perfected and made out—I am speaking of the verbal agreement—we were talking, perhaps, an hour in Mr. Martin's office.

Q. I guess you didn't understand my question. The question I asked was, May you not have told Mr. Rogers he could have that hundred dollars in your settlement; may you not have told him that?

A. I don't recollect, and my recollection is pretty clear at the final offer I made to Mr. Rogers, that there was any mention of that $100 of Mr. Bacon. I made the final proposition and rather than do anything further I would fight it out.

Q. Your understanding was that in that final settlement the $100 was wiped out as far as you were concerned?

A. My understanding was——

Q. Answer that question.

A. I will answer it just as I understand the matter. My understanding was that the whole matter involving the Rogers claim—the Bacon and Chittendon claims or obligations—were all involved in that arrangement.

210 Q. All cancelled?

A. Yes; all of them—that is, I didn't have any intention to pursue Bacon. I regarded it as a settlement of the whole concern.

Q. Including that $100?

A. I regarded it as a settlement of the whole concern.

Q. May you not be mistaken regarding another thing; that the consideration you was to pay Rogers was $2,750?

A. I am absolutely clear on that. That is as clear and fresh in my memory as though it had occurred half an hour ago.

Q. Nothing about this matter any clearer to you than that?

A. That is perfectly clear in my mind, that my offer was $2,750, and that was accepted, and that was what was in the contract. I am absolutely clear on these points.

Q. Don't you think you can be mistaken about that?

A. I think not. In fact, I am sure that I am not mistaken.

Q. Suppose that the deed you got up—wrote yourself—from you to Mr. Rogers contained the statement that the consideration which you was to pay Rogers was $2,850. How would you explain it?

A. Suppose it contained a statement?

Q. I will repeat it again. Suppose—have you got it?—that the deed (you see) that you drew up yourself and gave to Mr. Rogers contains a statement that the consideration you was to pay Rogers (got it so far?) is $2,850. How would you explain that?

A. I must deny, first, that it contained such a statement. If it

did contain such a statement, or if it does contain such a statement, it would require an explanation, which I am not now able to give.

Q. You would be good for it if you had the chance, you think?

A. No, sir; I——

211 Q. Now, it does contain that statement in black and white, in your own handwriting, that you was to pay Mr. Rogers $2,850, just exactly as Hadley and Rogers have stated. Now, how can you account for your writing such a thing as that in that paper when there is not a word of truth in it?

A. Produce the paper and show me the statement.

Q. It is in my office.

A. Well, I say produce it and let me see it. From my recollection of it, I don't know there is such a statement.

Q. You think there is no such statement in the deed you gave to Mr. Rogers?

A. To my recollection, there is no such statement in it.

Q. There was no occasion for putting such a statement in it?

A. No occasion for it.

Q. If you wrote any such thing you did it without any foundation for it?

A. If I wrote it I did it without any foundation for it that I now remember.

Q. Can you explain it, if there is any such thing?

A. I don't know. The easiest way is to produce the deed and let me see it. However (if you will allow me to make my statement), I do recollect putting the consideration at $2,850 in the deed running from me to Rogers, but not in the deed from Rogers to me, because I had no occasion to mention the consideration from Rogers to me in my deed. If there is any such thing it is entirely unknown to me. I might do such a thing in my sleep, perhaps; I don't know.

Q. You say it might be $2,850 in the deed to you?

A. No. In my deed to him there is a money consideration *on* which never was passed, never had any existence, mentioned in my deed to Rogers—$2,850.

Q. There is?

A. There is, sir. That is my recollection.

212 Q. There is mentioned $2,850?

A. Yes, sir; but that consideration is ideal; it wasn't real; there was no such money ever paid me.

Mr. LAWLER: You mean the deed from Rogers to you?

A. No; my deed to Rogers. My deed to Rogers recites a two-fold consideration—one is the deed to me and the other $2,850, which $2,850 was never paid to me and never was in existence; was an ideal consideration.

Q. Why do you say now that in your deed to Rogers there was mentioned $2,850?

A. Because it is in it.

Q. Why have you stated four or five times there was no such thing?

A. I did not so state.

Q. Mr. Bacon testifies that he attempted for several years to get you to fix this matter up. Is that true?

A. It is not true in that form.

Q. Wasn't he running after you for the first two years or so trying to get you to settle the matter up?

A. He was running after me trying to get me to see Mr. Chittendon sometimes, but generally to try and get me to surrender my interests.

Q. Now, Mr. Hennessy, hold on. The first year after you made this contract with Bacon wasn't he trying to get you to close the matter up, and nothing said about releasing your contract and surrendering your interests?

A. My recollection is not.

Q. The first year?

A. The first year.

Q. You think immediately after making the contract with you he commenced to try to get you to give it up?

A. I don't state anything of that kind—that he did immediately after. Between the words "immediately" and the "first
213 year" there is a big difference.

Q. Why didn't you go and tender to Chittendon that money after you heard the deed had come?

A. Because at the time I heard the deed had come I was aware of the condition, very likely, of the title, and it was their duty to fix that title.

Q. What made you go and tender the money to Chittendon when you did?

A. I went to tender the money to Chittendon when I did for the reason that on that day Bacon's contract would expire, and it became obligatory for Bacon to make the tender, and he tried to get me to give him money to make the tender in his own behalf before, which I declined to do.

Q. You regarded the deed from Chittendon to Bacon as expiring unless the money was paid on a certain day?

A. I didn't regard it as expiring, because I didn't know anything about the deed at the time.

Q. The contract, then?

A. The contract, I understood, was limited to the 27th of June.

Q. And that expired unless you tendered the money by that time?

A. Unless he performed his side of the contract; I so understood from Bacon.

Q. What was your idea about it?

A. I don't know that I had any. I don't know whether I knew anything more about it than he told me.

Q. Did you know Mr. Chittendon had not received the deed?

A. I think Mr. Bacon stated that fact to me.

214 Q. And you went and tendered the money when you knew that fact?

A. Certainly.

Q. And when you knew the deed had come you did not again offer to pay the money? Say no.

A. No; I don't. I make a distinction between offering to pay the money and making a tender.

Q. You didn't make a tender?

A. I did not.

Q. You made, as Mr. Chittendon said, about a dozen objections to that title, didn't you?

A. I didn't. I made no objections.

Q. You didn't write down about a dozen objections to that title?

A. I wrote, as I testified in my first examination, whatever the record revealed regarding the instruments on record and whatever struck me in looking over the abstract.

Q. Now, the question. You didn't make about a dozen objections to that title, as Mr. Chittenden says?

A. As I say, I made no objections save what I made to Mr. Horn.

Q. You didn't write out about a dozen objections to that title in your own handwriting?

A. I wrote minutes of what the records revealed in regard to that title, and those minutes I gave Mr. Horn, and he was to pass on the title.

Q. Did you write down a dozen objections to that title?

A. I have to say just as I said before. I made minutes in examining the records. You can call them objections or not.

Q. I am asking you did you make objections in your own mind—about a dozen objections to that title?

Objected to as immaterial, incompetent, irrelevant.

Q. Did you write a dozen of what you thought—I don't care whether material or not—did you write down a dozen of what you thought objections to the title?

215 A. I wrote down or called attention to what appeared irregularities regarding that title?

Q. Was there about a dozen?

A. I don't remember.

Q. About a dozen?

A. There might have been.

Q. When you say there were reservations in your contract with Rogers, what do you mean?

A. When I say there were reservations? I didn't say that.

Q. I understood you to say you didn't release Bacon & Chittendon fully—that it was limited to these land claims?

A. Yes; it was limited to that.

Q. What was not included?

A. Everything that was not expressed.

Q. What claim have you got against Chittendon and Bacon not included in that contract?

A. I don't know as I remember of any special claim not included in that, but I didn't want to make the general release. It wasn't necessary; it wasn't proper.

Q. But you said that there was something against one or both of them not included in that release?

A. That does not follow. I wasn't going to give a general release.

If I were to bring you the amount of a bill for services you would receipt for the services only.

Q. What did you mean by that not being a full release of the claim you had against Bacon & Chittendon?

A. Well, I meant that it released them from nothing that it did not state, and my recollection of it is that it stated or referred only to claims under these contracts?

Q. Did you have any claims against Chittendon or Bacon aside from these contracts?

A. I might have had some claims; yes, sir.

Q. What were they?

216 A. I might have made claim against Mr. Bacon growing out of the assault of the preceding evening.

Q. Anything else against either one?

A. There might be.

Q. What was it?

A. I don't recall whether there was anything else in my mind or not at the time. If I never had any, I would have the same objection to a general release.

Q. Isn't this the fact (I want you just to straighten this thing up yourself) that you agreed with Mr. Rogers on $5,700, half of $5,700, $2,850, as what you should pay Mr. Rogers, and isn't that the reason why you yourself wrote with your own hand in the deed $2,850?

A. No, sir; it was not.

Q. How do you get at that amount of $2,850 unless it was just the half of $5,700?

A. It was not a real consideration, a mere caprice of my own.

Q. Your intentions are to be perfectly truthful?

A. Yes, sir; perfectly truthful. I was actually out of pocket $2,850, including the $100 I had paid Bacon. *I was actually out of pocket* $2,850, *including the* $100 *I had paid Bacon.* My stipulation with Mr. Rogers was $2,750 cash.

Q. And the other $100 made $2,850?

A. 2,850.

Redirect examination:

Q. If there is any further explanation you have to make of the matters testified to in your cross-examination, make it.

A. I would say regarding my last answer it was a caprice with me. I did it for the reason stated and for the further reason that I wished to make it appear that Mr. Rogers was paying no more than I was paying him. My claim to the property was better than his. That was the further idea of putting it in. It was entirely an ideal consideration.

Recross-ex.:

Q. You knew that Rogers had paid $1,000 to the Sanborns
217 for their interest, didn't you?

A. I believed it was true.

Q. You believe it yet, do you not?

A. I do, sir; I have no reason to doubt it.
Q. Mr. Sanborn swore to that?
A. Yes.
Q. That was all the claims of the Sanborns, that $1,000; that was all he paid out; that $1,000 was all he paid for it; that time all he paid out, that $1,000 was all he paid for it?
A. For the Sanborns' claim?
Q. Yes.
A. Yes; that is all he told me.
Q. That was before you settled?
A. Yes, sir; it was at our interview in his office.

DAVID HENNESSY.

It is stipulated that if the contract is found it may be attached to the evidence by consent of the parties.

T. F. MARTIN, sworn on behalf of defendant, testified:

Direct examination by Mr. LAWLER:

Q. You are the Mr. Martin referred to as having been present at the time when the verbal agreement was made between Mr. Hennessy and Mr. Rogers, are you?
A. Yes, sir.
Q. State your best recollection of the amount that was finally offered by Mr. Hennessy to Mr. Rogers and was finally accepted by Mr. Rogers in this agreement.
A. My best recollection of the conversation between Mr. Rogers and Mr. Hennessy is that the settlement was made at $2,750.

Cross-examination:

Q. Is that all you recollect about it, Mr. Martin?
A. There was considerable said at that consideration, but
218 that, as I recollect, was the final settlement. There were several offers or propositions made by Mr. Hennessy which were refused by Mr. Rogers, and that was the final one.
Q. How came you to be there?
A. It was in my office.
Q. Where is your office?
A. 145 E. 5th St.
Q. Is that Mr. Hennessy's office?
A. No, sir.
Q. Was Mr. Hennessy in there?
A. He was.
Q. And Mr. Rogers?
A. Yes, sir.
Q. How came they to be there?
A. As I recollect it, Mr. Hennessy was in there and Mr. Rogers came in afterwards.
Q. Was it by appointment at your office?
A. I don't really know that, sir.
Q. Do you know how they came to meet there at your office?

A. I do not.
Q. What was your business?
A. Real estate.
Q. With whom was you associated?
A. I was alone at that time, sir.
Q. Did Mr. Hennessy make his headquarters at your office?
A. To some extent, he did—that is, he was frequently around and was in almost every day; not in some days. Sometimes there would be a few days pass that he wasn't in.
Q. What were your relations with Mr. Hennessy at that time? Just state fully. I want to get at the facts, that is all.
A. I acted as agent for Mr. Hennessy at that time.
Q. Attending to his business?
A. For some matters; yes, sir.
Q. Were you formerly a resident of Dubuque?
A. Yes, sir.
Q. And after you came up here you acted for Hennessy?
219 A. I acted at times as I act now at times. I wasn't permanently employed by him—that is, I acted in the capacity of an agent when required to do so.
Q. You are in his employ?
A. Not permanently, sir; at times I am.
Q. Did you have anything to do with this transaction outside of what you heard there at that time?
A. I think I called on Mr. Rogers once—I disremember just what it was for—and I got the contract of settlement from Mr. O'Brien on an order from Mr. Rogers after the settlement was made.
Q. Do you know what became of it?
A. To the best of my recollection I gave it to Mr. Hennessy.
Q. Do you know that the consideration that Mr. Hennessy was to pay Mr. Rogers was not $2,850, $100 to be deducted, leaving $2,750? Do you know that that was not the arrangement between them?
A. I don't remember hearing anything said about that $100 at the interview in my office.
Q. What was the conversation you heard in your office?
A. Well, it was a conversation of settlement, both parties making propositions, talking and trying to get to a settlement.
Q. Do you recollect Mr. Hennessy's offer of $2,300, $2,400?
A. He offered, I think, three or four different amounts before he made his final offer.
Q. Didn't you hear him say that in offering $2,750 he figured on that $100 of Bacon's?
A. No, sir.
Q. Did you hear his testimony here to-day?
A. Yes, sir.
220 Q. Did you hear him say that in this same office he figured on that $100?
A. No.
Q. Well, you recollect the final talk was that Hennessy was to give Rogers a clear $2,750?

A. Yes, sir.
Q. That is all you recollect about it?
A. I recollect parts of the conversation.
Q. You don't recollect whether the $2,750 was $2,850 with the $100 thrown off?
A. I don't recollect hearing anything about $2,850, nor do I recollect hearing anything about the $100 of Bacon.
Q. Not in any of their talk?
A. No, sir.

T. F. MARTIN.

H. C. McCARTEY, sworn on behalf of the defendant, testified:

Direct examination by Mr. LAWLER:

Q. You are the Mr. McCartey referred to as having been present in Mr. Rogers' office March 18, 1886, when the conversation took place between Mr. Hennessy and Mr. Rogers that has been referred to, are you?
A. Yes.
Q. State what passed, as you recollect—what Mr. Rogers claimed concerning the interest he had purchased from Sanborn.
A. Mr. Rogers claimed in that interview that he had purchased from Mr. Sanborn some interest, and that he had paid Mr. Sanborn $1,000 for it, and that he could hold that whatever the result of any controversy between Bacon and Hennessy might be in regard to the balance.
Q. Was there anybody present except you and Mr. Rogers and Mr. Hennessy?
A. No.

H. C. McCARTEY.

Adjourned.

221 DEC. 12, 1887.

Witness Hennessy called at the office of the notary, 91 Globe building, St. Paul, and before signing his testimony desired to make the following explanation of ans. to cross-interrog. 4:

That is, assuming that the other side was acting honestly and in good faith with me, and that no deception or fraud had been or was practiced upon me, I intended letting everthing rest there. I did not intend pursuing Bacon for the $100, which he told me the evening before he would not give me if he could help himself, whatever my legal claim to it might be. This explanation I wish to apply also to cross-answers 2, 5, 9, 10, 11, 12, and perhaps in a remote way to 57, 58, 59, 60, 63, & 64.

DAVID J. HENNESSY.

222 United States of America, Circuit Court, *ss:*

I, A. W. Cuming, a notary public within and for the county of Ramsey and State of Minnesota, do certify that by virtue of the stipulation on file in the case of Bacon & Rogers *vs.* Hennessy the

foregoing testimony in rebuttal on behalf of def't was taken before me at the office of Mr. H. C. McCartey, at the time named therein, and was reduced to writing by me; that the said testimony was taken by oral interrogatories; that each witness before testifying was by me duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in said stipulation, and that the testimony of each witness was carefully read over by him and then subscribed by him in my presence.

A. W. CUMING,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

Dec. 13, 1887.

223 DEC. 13, 1887.

"Contract referred to in stipulation on page 38 of def't's rebuttal, identified by witness Hennessy as the original contract in E. G. Rogers' handwriting.

A. W. CUMING,
Notary Public."

This agreement, made and entered into this March 18, 1886, by and between David J. Hennessy, of Dubuque, Iowa, and Edward G. Rogers, of St. Paul, Minnesota, witnesseth:

That whereas said David J. Hennessy claims to be the owner of the following-described property, situated in the county of Washington and State of Minnesota, and described as follows, to wit: The southeast quarter and the east half of the southwest quarter and the northeast quarter of the northwest quarter, all of section (31), township (29) north, of range (21) twenty-one west; and whereas Edward G. Rogers claims to be the owner of the same property: Now, to settle the same, the said Edward G. Rogers hereby agrees to make and execute to said David J. Hennessy a quitclaim deed of an undivided one-half of said property; and the said Hennessy agrees to execute and deliver to said Edward G. Rogers a quitclaim deed of an undivided one-half of said property; and also, in further consideration of said deed, to pay said Rogers the sum of ($2,750.00) two thousand seven hundred and fifty dollars.

This settlement to be in full of all claims in favor of said D. J. Hennessy and against one George V. Bacon and one George N. Chittenden growing or arising out of any contracts in regard
224 to the sale or purchase of said land by said Hennessy from said Bacon or said Chittenden.

This agreement to be executed and carried out as soon as possible, and at least within 30 days from this date, if possible. Time is not of the essence of this agreement.

DAVID J. HENNESSY.
EDWARD G. ROGERS.

(Endorsed:) Filed Dec. 13th, 1887. Oscar B. Hillis, clerk.

225 United States Circuit Court, District of Minnesota.

GEORGE V. BACON and EDWARD G. ROGERS
vs.
DAVID J. HENNESSEY.

OCTOBER 11, 1887—2 p. m.

Parties met pursuant to stipulation, and E. S. CHITTENDON, being produced and sworn on part of defendant, testified as follows:

Direct examination by Mr. MCCARTEY:

Q. Where do you reside?
A. St. Paul, Minn.
Q. How long have you lived in St. Paul?
A. Since 1869.
Q. What is your profession?
A. Attorney-at-law.
Q. How long have you been engaged in that profession?
A. Nearly twenty years.
Q. Are you acquainted with the parties in this action?
A. I am.
Q. How long have you known them?
A. I have known Mr. Rogers and Mr. Bacon 18 or 19 years; really from the time of my residence in St. Paul, I think. I don't know just exactly when Mr. Bacon first came to St. Paul. I remember meeting him soon after he came. Mr. Hennessy I first met, I think, in 1882 or 1880; in regard to this transaction, I suppose about the date of that contract.
Q. Do you know one Geo. N. Chittendon, and when did you first become acquainted with him?
226 A. I can't tell the exact date. It was a year or two before the contract was made with Mr. Bacon.
Q. A year or two before March, 1882?
A. Yes; the date of that contract. I don't know what the date is.
—. A year or two before the date of that contract between Geo. N. Chittendon and Mr. Bacon?
A. Yes, sir.
Q. Did you have anything to do with the making of this contract between Geo. N. Chittendon and Mr. Bacon, the plaintiff?
A. No, sir. I think Mr. Chittendon saw me before the making of the contract, but I had nothing to do with making it.
Q. Did he consult you before the contract was made in regard to his sale to Bacon?
A. I think not. There were some preceding transactions in regard to the land he consulted me about, but I think not in regard to Mr. Bacon.
Q. Do you remember the transaction regarding this land?
A. Yes, sir.
Q. Did you know of this contract between Bacon and Geo. N. Chittendon at the time it was made?

A. Well, my recollection in regard to all these matters is not distinct, perhaps, because I didn't pay any special attention to dates, times, &c.; never had occasion to do so; but my recollection is that after that a contract was made with Mr. Bacon. Mr. Chittendon brought it to me and left it with me; that that was the first I knew of it. That is my present recollection of it.

Q. Is your recollection clear enough so you can say whether or not that contract was made in your office?

A. I don't think it was. I think it was just as I have told you—that Mr. Bacon and Mr. Chittendon made that contract and then brought it to me. I may be mistaken, though.

227 Q. The contract, after it was made, was left with you?

A. Yes, sir; as I recollect.

Q. By whom?

A. Mr. Chittendon.

Q. For what purpose?

A. For the purpose of carrying out the terms and provisions of the contract, I suppose.

Q. Where did Geo. N. Chittendon then reside?

A. Illinois.

Q. Plainfield?

A. Yes, sir.

—. Still resides there?

A. I think so.

Q. He left it with you to close it up in his absence?

A. Yes, sir.

Q. He went back, did he?

A. Yes, sir.

Q. What directions did Mr. Chittendon give you in regard to the contract?

A. Well, I surely couldn't say that. All I can say about that is that it was left with me with the understanding that the deed would be sent and delivered when payment was made under the terms of the contract. That is all there was about it, as far as regards instructions.

Q. And that, you say, closed the transaction?

A. Yes; acting as agent for Mr. Geo. N. Chittendon.

—. Subsequent to the time you received those instructions, state whether you received information that Mr. Bacon had transferred his interest under this contract to Mr. Hennessey, the def't.

A. No; I don't remember that I had any such information. My recollection, fortified by a letter which I have and which I have looked over, is that my understanding was that Mr. Bacon had sold an interest in that contract to Mr. Hennessey. I simply refer to that. I see, in looking over the letter, that that was my impression at the time.

Q. Then Mr. Bacon and Mr. Hennessey called on you again in reference to closing up this transaction?

A. Yes, sir.

Q. Do you remember the date?

A. I don't at all.

Q. Can you approximate the date?

A. I cannot.

228 Q. Have you any means of approximating the time?

A. None whatever. I had no occasion to fix the date and don't remember it at all.

Q. They called, and what transpired?

A. Mr. Hennessey made a tender — what he said was the consideration under that contract—brought in some money and made what he called a tender under the contract.

Q. Did he hand you the money?

A. He did not.

Q. But he showed you the money?

A. Showed me he had some money.

Q. Was it gold, silver, or bills?

A. I couldn't say. My recollection is that he had a package of bills, but it might have been something else.

Q. You don't remember now what form the money was in?

A. No; only what I have stated my recollection of it to be.

Q. Did you at that time have a deed?

A. I did not. That I remember quite distinctly.

Q. Didn't you write for a deed?

A. A deed was to be sent, but it had not been received.

Q. Had it not been understood between you, Bacon, and Chittenden that it should be sent to you?

A. It was the understanding at that time a deed should be sent.

Q. Did you write for a deed at that time?

A. No.

Q. Didn't you after that?

A. I don't recollect that I did. My recollection is that it came in the ordinary course.

Q. But you didn't have it at that time?

A. No.

Q. And you so stated to Mr. Bacon and Mr. Hennessey?

A. Yes, sir; I so told them.

Q. Do you remember how long it was after the time of this tender that the deed reached you?

A. I do not. It was not a great while, though, according to my recollection.

229 Q. What ever became of that deed that was sent you?

A. It lay in my safe for a couple of years, I should think—a year or so—until the matter was finally settled with Mr. Rogers.

Q. Is the deed in existence now?

A. I don't know where it is.

Q. It is not now in your possession?

A. No, sir.

Q. Did you ever give it to anybody?

A. I don't remember that I did.

Q. Have you any recollection as to whether you did?

A. I couldn't say of my own recollection or knowledge what was done with it. I have been told outside what became of it.

Q. You have been told by whom?

A. Some of the parties to the transaction, but I don't remember personally what became of it.

Q. Which of the parties to the transaction?

A. Well, Mr. Rogers.

Q. What did Mr. Rogers say was done with that deed?

A. Let Mr. Rogers tell for himself.

Q. I asked you.

A. Mr. Rogers said it was delivered to him.

Q. You mean Mr. Rogers, one of the plaintiffs?

A. Yes, sir.

Q. But you have no recollection whether it was or not?

A. I don't recollect what became of it, whether it was delivered to him or sent back to Mr. Chittendon; that would seem to be the most natural thing to be done with it.

Q. To whom did that deed run?

A. Mr. Bacon.

Q. Geo. V. Bacon?

A. Yes, sir.

Q. From Geo. N. Chittenden?

A. Yes, sir.

Q. Was it a warranty deed?

A. I don't really remember. The contract called for that, and I suppose it was. I think the contract called for a warranty deed, and that was doubtless what he gave, but I don't remember.

230 Q. I think I asked this question before, but I will ask it again. How long after the tender was it before you received that deed?

A. I really couldn't tell you. As I said before, I think it was a short time.

Q. What did you do with it?

—. I doubtless (although I don't remember, except what I naturally would do and doubtless did do) told Mr. Bacon at once I had received it and wanted to settle.

Q. But you don't recollect whether you did or not?

A. I can't tell just when and what I did.

Q. You was agent in the transaction?

A. Yes, sir.

Q. And yet you have no recollection of what you did with it?

A. I can't tell positively whether that was what I did, as I said before. After a good deal of trouble I finished that matter up and dismissed and have not borne the details of it in my mind. I don't try to carry ancient history.

Q. During the time the contract was left in your hands as agent for Geo. N. Chittendon did you furnish an abstract either to Mr. Bacon or Mr. Hennessey?

A. Some time after that contract was left in my hands I did deliver to one or the other—I am quite sure it was Bacon, although I can't tell positively—an abstract of the property. My dealings were altogether, as far as I recollect, with Mr. Bacon, and undoubtedly I gave it to him.

Q. You had no other dealings, then, with Mr. Hennessey in

reference to the matter except at the time he came with Bacon to make tender?

A. That is my recollection, although I might have seen him and perhaps did in regard to his objections to the title as shown in the abstract.

Q. You did receive objections to the title as shown in the abstract?

A. I received a statement, which I ascertained was in Mr. Hennessey's handwriting, naming a number of objections to the title.

Q. Do you know where those objections are?

A. I do not.

231 Q. What did you do with them?

A. I kept them in among the papers some time, and after the transaction was closed I don't know what became of them.

Q. The transaction was closed at what time?

A. At the time the deed to Mr. Rogers was delivered.

Q. About the time the deed from Geo. N. Chittendon to Edw'd G. Rogers was delivered?

A. Yes, sir.

Q. And you don't know what you did with these objections?

A. No, sir; I couldn't tell; I don't know. I will say further that this forenoon, in looking over some of my papers, I came across a package which contained these Chittendon papers, and the objections are not in that package. All it contains are some letters of an early date.

Q. Then you had other papers besides the objections and the deed?

A. Yes.

Q. Did you also have the abstract—the one you delivered to Bacon?

A. I delivered that to Bacon, I think, and I don't know what became of it.

Q. Did that ever come back?

A. Possibly.

Q. Is it your recollection that it did come back with the objections?

A. Possibly it did—very likely it did.

Q. Haven't you any recollections as to what you did with this package of papers at the time the deed was passed to Mr. Rogers?

A. Only that whatever papers were of interest to Mr. Rogers I delivered to him.

Q. What papers did you have besides that deed and possibly the abstract and these objections and letters that you received from Mr. Chittendon?

A. My recollection is one or two old mortgages and satisfactions of mortgages and letters of correspondence with other parties with respect to the Sanborn claim.

Q. You then had correspondence with other parties giving information as to what was called the Sanborn mortgage?

232 A. I had? I don't know. If I may be allowed to state—I don't know just the point in controversy, but it seems to

me that there is a good deal of time wasted in what does not touch the point, and I want to get through as soon as I can.

Q. You remember, Mr. Chittenden, among the objections to this title was the objection that there was a cloud upon the title by reason of the mortgage which appeared of record unsatisfied of which Mr. J. B. Sanborn had the assignment?

A. I do.

Q. And there was also a defect, was there not—a flaw—in the title, an outstanding title, to a certain 40 acres?

A. I don't remember the details; but there was something of that sort. I don't remember what.

Q. In reference to that 40 acres, that portion on which there was an outstanding title?

A. I don't remember the outstanding title; there was some defect. I don't know just what it was.

Q. Did you correspond with reference to that particular defect?

A. I don't recollect that I did; my recollection is with respect to the Sanborn matter.

Q. Do you recollect with what parties you corresponded in reference to the Sanborn matters?

A. I can't recollect the names. I have an indistinct recollection of somebody by the name of Moore as one of the parties, and there was a party up at Anoka at the time I mention; he removed to some other place, I can't tell what. That was in regard to the Sanborn mortgage, as I call it.

Q. It had been called to your attention that there were these flaws in the title and you yourself had taken pains to correspond with parties in reference to this Sanborn mortgage?

A. I had done so; yes, sir.

Q. In order to get evidence for the purpose of clearing the cloud on the title?

A. That was what I was doing; yes, sir.

Q. And you had satisfaction of that mortgage in your possession?

A. No, sir.

233 Q. Or an assignment of it?

A. No, sir.

Q. What was it?

A. It was some other mortgage upon the property. I don't remember just what it was.

Q. Another mortgage?

A. Yes, sir.

Q. You had information given in letters regarding the Sanborn mortgage?

A. Yes, sir.

Q. You had evidence then or information in your possession finally which satisfied your mind as to the invalidity of this so-called Sanborn mortgage?

A. I was satisfied from the statements made to me and letters received by me that the mortgage had been paid, and I so stated to Bacon repeatedly just as soon as I found out.

Q. You informed Mr. Bacon then as to the information you had received regarding it?

A. Yes, sir; he had full information as to what I had done and was doing.

Q. Can you tell when you informed Bacon of these facts?

A. I cannot give the date; just as soon as I received the information I informed him, or very soon thereafter. I was quite desirous of closing it up and lost no time about it.

Q. What steps did you take in regard to the other defects in the title?

A. None that I remember of, for the reason I never could find out that any were necessary.

Q. You needn't state that now.

A. I had a good reason for it.

Q. Did you inform Geo. N. Chittendon of the flaws in the title or these objections made to the title?

A. I undoubtedly did. I was in correspondence with him in regard to those facts of which he had knowledge.

Q. Then you don't know of anything having been done aside from what you did to clear up these clouds?

A. I don't know of anything except what I and Geo. N. Chittendon did.

234 Q. Do you know of Mr. Geo. N. Chittendon doing anything aside from what you said you did?

A. We were co-operating.

Q. In that correspondence you mention giving that evidence regarding the Sanborn mortgage?

A. Yes, sir.

Q. Anything else?

A. Not that I know of.

Q. Did you do anything else with that deed which you say you received from Geo. N. Chittendon except to inform Mr. Bacon that you had it?

A. I don't think I did until it was finally disposed of.

Q. You never made a tender of any deed so made, giving Mr. Bacon information that you had it?

A. Possibly not a formal tender. I told him repeatedly that I had the deed and was ready to deliver it on payment of the consideration.

Q. You required, then, payment of the consideration?

A. Certainly.

Q. Without perfecting the title as to these defects you mention?

A. I required payment of the consideration before the delivery of the deed.

Q. And you requested Mr. Bacon to take the deed up?

A. Yes.

Q. And you told Mr. Bacon you had these evidences in regard to the mortgage?

A. I did.

Q. And did nothing in regard to the other flaws in the title?

A. I didn't consider the other objections made as amounting to

anything. Further, I will say that I endeavored to ascertain what would satisfy Mr. Bacon, and, I supposed, through him, Mr. Hennessey, with respect to the matter.

Q. You knew Mr. Hennessey had at least obtained an interest in the fulfillment of the contract?

A. I understood so.

Q. Did you endeavor to inform yourself?

A. Not that I remember.

Q. Do you remember whether you was informed by Mr.
235 Hennessey or Mr. Bacon at the time the tender was made that Mr. Hennessey had purchased Mr. Bacon's interest under that contract—that he had purchased the whole interest?

A. No, sir.

Q. You didn't know then?

A. Not to the best of my recollections.

Q. Your recollection is not very clear on that point—as to just what was told you?

A. I hadn't it placed in mind—didn't fix it in my mind.

Q. You think you had a good many talks with Bacon?

A. I know I did.

Q. How long before the deal was finally closed—I mean by transfer of the title to E. G. Rogers—when Mr. Bacon informed you of his willingness or consent that the title should go to Mr. Rogers?

A. Only a short time, I think. I had been endeavoring to close the transaction since Mr. Bacon informed — there was a prospect of its being ended. I closed it as soon as possible—as soon as I could make terms and secure the deed.

Q. What did Mr. Bacon say to you in regard to there being a prospect of the contract being closed?

A. I can't remember the details of the conversation.

Q. Give the substance.

A. The substance, as I remember it, was that through some arrangement with Mr. Rogers the consideration would be paid and the deed taken up without requiring Mr. Sanborn to be settled with by Mr. Chittendon or the clearing of the other alleged defects, if there were any, in the title; he would take the property and pay the consideration. That was the transaction.

Q. Mr. Bacon told you that by some arrangement between him and Mr. Rogers Mr. Rogers was to take the property—take the title—and that Mr. Chittendon was to be permitted to convey it without settling with Sanborn or clearing up any of the alleged defects?

A. Yes; Rogers was to take the property as it stood and pay the consideration.

Q. I will ask you whether there was any other considera-
236 tion?

A. There was.

Q. Aside from what you have already stated (the property was to go to Mr. Rogers), whether any consideration was stated by Mr. Bacon to you when he stated there was a prospect of the deal being closed by an arrangement between him and Mr. Rogers.

A. I don't know as in the first place, when I had my first talk

with Mr. Bacon, there was. I don't remember about that, but the result was that an additional consideration was paid by Mr. Rogers for the deed, and that the consideration consisted in the purchase-money of the amount originally named in the contract and all the taxes and disbursements made by Mr. Chittenden meantime——

(Objected to.)

—and interest on the consideration, as I remember, and I don't know but what other matters—I know the consideration was different—and then he took the property, agreeing to look after all incumbrances and claims against it.

Q. How many talks did you have with Mr. Bacon in reference to the property being transferred to Rogers before it was transferred?

A. I couldn't say that.

Q. Were there many?

A. I don't think there were.

Q. About how many?

A. I really couldn't tell you whether two or twenty. I have no recollection as to the number. I never burden my mind with things of that sort.

Q. How many talks did you have with Mr. Bacon in reference to the property going to Rogers before Bacon and Rogers came together in reference to it?

A. I couldn't tell you; not many, I should think; possibly two or three or half a dozen. I couldn't say with any certainty at all as to the number.

Q. Now, at the time the deal was closed by the deed going to Rogers Mr. Rogers and Mr. Bacon were both present?

A. I think they were, although I couldn't say positively.

Q. Let me remind you. Didn't you state in a conversation a few days ago that they were both present?

A. I say I think they were.

237 Q. That is your best recollection?

A. Yes, sir; although I am not positive, that is my recollection.

Q. And Mr. Bacon consented that the property be transferred to Mr. Rogers?

A. Yes; Mr. Bacon consented.

Q. What were the considerations upon which you induced Mr. Geo. N. Chittendon to let this property be transferred to Mr. Rogers instead of to Bacon or Hennessey?

(Objected to; objection to any correspondence or conversation between witness and Geo. N. Chittendon on account of that transfer, as it has been already stated that he was acting as agent for Geo. N. Chittendon, and any particulars or conversations or correspondence between him and his principal are incompetent and immaterial.

Q. I will waive that question and put a different one. I will ask you if in order to bring about the transfer to this title to Edward

G. Rogers, you didn't correspond with Geo. N. Chittendon to produce his consent and get his authority to carry it out?

A. I did.

Q. You hadn't any authority prior to this correspondence, had you, from Geo. N. Chittendon to have the title transferred to anybody else except those under the original contract?

A. No, sir; the only authority I had was to deliver to Mr. Bacon.

Q. After you received this proposition from Mr. Bacon to have the title go to Mr. Rogers did you recommend to Geo. N. Chittendon to accept the proposition and close it up?

Objected to as incompetent and immaterial.

A. I did recommend it.

Q. Now state whether there was any indemnity to Geo. N. Chittendon taken by you for Geo. N. Chittendon as against Mr. Hennessey in closing up that transaction. I mean to say when the deal was closed by the transfer of the title to Mr. Rogers was there any indemnity taken by you for Mr. Geo. N. Chittendon?

A. Before closing the transaction and delivering the deed to Mr. Rogers a bond of indemnity was taken protecting Mr. Chit-
238 tendon from claims of all parties against him.

The contents of the bond are objected to, without the bond being introduced, as incompetent.

Q. Do you remember whether there was any written release, assignment, or anything of that sort made by Mr. Bacon?

A. I don't remember that there was, other than his joining in the bond, which I think he did; I am not certain about it.

The last statement of the witness is objected to on the ground that the bond shows for itself and is the best evidence.

WITNESS: I have not seen the bond since it went to Chittendon and don't remember just what the contents are in regard to these defects in the title.

Q. Did you not at one time consult with Mr. Horn in regard to this matter, as Mr. Hennessey's attorney?

A. I had conversation with him, understanding that he was Mr. Hennessey's attorney. I should like to state the reason.

Q. It is unnecessary. I wish you would let me see what documents you have in reference to the title?

A. I have none.

Q. You had correspondence in reference to it?

A. I have letters received from Mr. Chittendon and copies of those I wrote him.

Q. I would like to look at those and refresh your recollection and mine as to what transpired.

A. That is a correspondence between me and Mr. Geo. N. Chittendon.

Any correspondence is objected to between witness and his principal, Geo. N. Chittendon, and any talks or conversation between

them on the ground that it is incompetent and immaterial. The witness also objects to the introduction of private papers and correspondence with one who is not a party to these proceedings.

Q. On what ground, Mr. Chittendon, do you object?

A. On professional grounds—as attorney-at-law and as
239 agent of Mr. Geo. N. Chittendon.

Q. Have you here in your possession letters received by — from Geo. N. Chittendon in answer to letters written by you to him in reference to the transfer of this property to Edward G. Rogers after you had received information from Geo. V. Bacon that the matter could be closed by such transfer?

A. I have.

Q. I will ask you if you have copies of the letters written by you to Geo. N. Chittendon—letter-press copies—to which those mentioned by you in your answer here were answers?

A. I have.

Q. Will you produce those letters for our inspection and for the purpose of their being put in evidence?

A. I would prefer not to do so until after the court has passed upon my liability to produce them, and in doing so I state that I am acting entirely on my own responsibility in the matter.

Counsel for plaintiff objects to letter-press copies as evidence as being incompetent.

Q. Do those letters refer to any other matters than those in reference to this transaction regarding this property?

A. They refer to some other persons in regard to the statements made that I should prefer not to have go through me.

Q. We will have to leave it, then, as the witness declines. We don't waive our right or our claim to the production of those letters, but will take such steps as we may be advised in regard to it.

WITNESS: I would really like to have the matter determined by the court in some proper shape.

By Judge LUSK:

Q. Were you attorney of Geo. N. Chittendon in relation to this land matter?

A. I was.

Q. And acted for him and with him in that capacity, as his attorney?

A. Yes, sir.

Q. As well as his agent?

A. Yes, sir.

Q. And these communications that are being inquired
240 about are between you and your client?

A. Yes, sir.

WITNESS: I wish to say that I don't wish to be in contempt or considered in contempt in declining to produce them until the order of the court has been passed upon the question. I think it a matter of right; that is the way I look at it.

Q. Having mapped out our line of examination and the witness declining to produce certain letters that we need for the purpose of information and evidence, we are not prepared to continue his examination further at the present time. We don't want to dismiss Mr. Chittendon, but we adjourn further taking of his testimony until after we can have a hearing of that matter.

Cross-examination by Judge LUSK:

—. In regard to Mr. Hennessy's tender made in your office, what did he say?

A. I couldn't recollect what he said at the time, I could only tell you the purport of it.

Q. The substance?

A. Well, that he produced that money as a tender under the Bacon contract, but as to his words in making it I couldn't give them.

Q. Did he produce the contract assigned to him?

A. I really could not say whether he did or not. I don't think he did, because my recollection is that I never saw the assignment until about the time or after I had closed with Mr. Rogers. That is my recollection.

Q. Do you know whether at that time he had an assignment from Bacon—when he made this tender?

A. I do not.

Q. Did he offer to pay that money without any conditions or reservations that he should have the title clear?

A. I think there was no talk about conditions or reservations at that time, if I remember rightly.

Q. Why didn't he take the title, then?

A. Because I had no deed to deliver.

Q. Was that ever transferred to Mr. Rogers?

A. It was after the first contract, but I hadn't received the deed from Mr. Chittendon. I had no deed.

241 Q. Did you inform Hennessey of that fact—that you had no deed?

A. I did.

Q. You spoke of having called upon Mr. Hennessey or had several talks with him in regard to closing the matter up? Can you state the substance of those conversations?

Objected to because the question assumes something that is evidently a mistake, because the witness did not testify to having conversations with Hennessey, but to having conversations with Bacon.

A. Mr. McCartey is mistaken. I testified that I had some interviews with Mr. Hennessey, but did not have as many as with Bacon; that I could not tell how many I had with Mr Hennessey.

Q. State the substance of the conversations with Mr. Hennessey relative to closing up the matter before Mr. Rogers undertook to buy out the title.

Objected to as not cross-examination. It is affirmative evidence for plaintiff.

A. My recollection of any conversation I had with Hennessey is exceedingly indefinite. I remember, though, meeting him on the street once or twice—once I am very certain, as I recall it—and urging the closing of this matter and the making of a statement of what the objections to the title really were. That one interview on the street is about all that I remember with any certainty with Mr. Hennessey, but I saw Mr. Bacon frequently in regard to it.

Q. Confine it to the question. Did you not go to Mr. Hennessey's attorney to see about this matter because of conversations you had with Mr. Hennessey?

A. I went to see Mr. Hennessey's attorney in order to find out what would be required for closing of it because of the conversations I had and because of the long list of objections that were made by Mr. Hennessey or were put into my hands as coming through him. That was the principal object in seeing Mr. Horn.

Q. Were the objections in the handwriting of Mr. Hennessey?

A. So stated to me.

Q. How many objections had he to the title?

212 Objected to. The objections being in writing, the objections themselves are the best evidence.

Q. Where are those written objections?

A. I don't know.

Q. Have you looked for them, Mr. Chittendon?

A. I have looked over all the papers I have, I believe, relating to that matter, and they are not there.

Q. You have not been able to find them?

A. No, sir. I have not made special search for them, but I have looked over all my papers.

Q. They are not in your possession?

A. So far as I know.

Q. How many objections did he make to the title?

A. I really could not tell; there was a long list.

Q. About how many?

A. At least a dozen.

Q. How long did this deed lie in your hands or how long was it after the contract was made before Geo. N. Chittendon sold this land to Mr. Rogers? There is the bond, if you would like to refresh your recollection, and here is the first contract.

A. I should say about three years. (Examining papers:) Looks like it.

Q. Then it was about three years you were at work trying to get Bacon and Hennessey, one or the other, to close up this old deal and have him take the deed and pay the money?

A. Yes, sir; off and on.

Q. And Bacon refused to do it and Hennessey refused to do it?

A. Yes, sir. Well, Bacon—that, perhaps, is not stating it exactly. Mr. Bacon said he couldn't do it and endeavored to get Hennessey; a practical refusal it was.

What Bacon said is objected to as hearsay evidence—incompe-

tent—and it is asked that what witness has already said regarding what Mr. Bacon said be stricken out.

Q. Mr. Hennessey politely declined, didn't he, Mr. Chittendon, to take the deed and pay the purchase price of that land until all these objections that were made were straightened out to his satisfaction; is not that about the substance of it?

A. I never could get from Hennessey any statement as
243 to exactly what he would do or would require, but my understanding was——

By Mr. McCARTEY: (Never mind what your understanding was.)

(Mr. LUSK:)

Q. Your understanding from what he said was what?

Objected to. The witness should state what Mr. Hennessey said if he remembers any conversation in regard to it, and he has already said that he does not remember any conversation.

A. That he insisted on the objections, as I first stated.

Q. This long list of objections?

A. Yes, sir; a long list of objections.

Q. If I understand you, you examined into the objections carefully, and after ascertaining to your satisfaction that the Sanborn mortgage was paid or satisfied you found no other objections that amounted to anything?

Objected to as incompetent, irrelevant, and immaterial, and also calls for the opinion of the witness.

A. I would say that I considered nearly all the objections that were raised as being unsubstantial, aside from that mortgage and one other, to which we had satisfaction.

Q. Then you satisfied yourself that the mortgage, although it stood apparently unpaid of record, was in fact paid?

A. I did.

Q. So that there were no defects or objections left to the title that you considered of any force?

Objected to as calling for the opinion of the witness, immaterial, irrelevant, incompetent.

A. That is my present recollection of it.

Q. Don't you recollect telling Hennessey that his objections were captious and frivolous, or words to that effect?

A. I don't recollect telling Hennessey that. I didn't hesitate to state it that way, but I don't really recollect saying so to Mr. Hennessey.

244 Q. Did you try to satisfy him that the Sanborn mortgage was paid, so as to remove that objection from his mind?

A. As I said before, I don't recollect specially talking to Mr. Hennessey about that, but I did to Bacon just as soon as I found out about the facts, and, as I previously stated, I was dealing more with Bacon than I was with Hennessey.

Q. I wish to refresh your mind a little. In regard to all those objections do you wish to have it understood that notwithstanding all these objections he made to that title he came in and offered you the whole consideration for the land without any reservations—offered you so much money right out?

A. That is my recollection of his coming in and making tender.

Q. I know; but was that defined—just giving the money right into your hands without any title or deed?

A. Not without the deed. I supposed, of course, the deed must be forthcoming, and not having that the money was not received, not paid. That is my recollection of it. The only reason the money was not paid at that time was the deed not being there. There might have been something back of that. That was in 1882. I have transacted a good many pieces of business since then.

Q. Do you recollect when these objections were offered?

A. My recollection is that the objections were given after that tender was made.

Q. And he complained about the title after that for some three years?

A. I never heard of his withdrawing the objections.

Q. Never came to you to withdraw his objections to the title before the sale to Rogers, and said he would waive his objections to the title and take the deed and give you the money?

A. No, sir; he never did. I never saw any money in regard to the matter afterwards till Mr. Rogers paid it.

Q. You spoke about delivering a deed. I will call your
245 attention to that—delivering a deed to Bacon. Don't you recollect that was for Rogers to hold until you got the deed from Geo. N. Chittendon and then Mr. Rogers to give you back the deed?

A. I am not certain except I remember that Mr. Rogers told me (I think after paying the money)—told me he would hold it until the other was received, but what became of the first deed after that I don't recollect.

Q. Have you no recollection about whether he handed back the deed to you or not?

A. No, sir; I could tell you what the probabilities are. On thinking it over I have some kind of a recollection of having sent that old deed to Mr. Chittendon when I sent the bond to him, and the other deed was delivered. That comes to me now as having been done. (My letter would show as far as that goes.) I think that is the way it was done. It is the proper way, and I think I did that way.

Q. Just stir yourself up a little and get your recollections clear about it. Isn't this the substance of that trouble up to a certain point—that Hennessey and Bacon neither one of them would take the deed and pay the money because of those objections, and Rogers finally agreed to take the land and pay the purchase price, and that he would take care of the objections and give Mr. Geo. N. Chittendon a bond to do it.

Objected to as incompetent, irrelevant, and immaterial and not cross-examination, and calling for conclusions.

A. That is substantially the way in which the matter was closed and the facts in the case, except that Mr. Bacon expressed his willingness to close it if he could ever make any arrangement with Hennessey about it.

Counsel for defendant asks that the statement as to what Hennessey said or expressed be stricken out as hearsay, irrelevant, immaterial and incompetent, and not responsive to the question asked.

246 Q. Have you stated in your testimony and in answer to the questions asked you by Mr. McCartey that you had a number of conversations with Bacon? Did he at any time object to closing up the contract with Hennessey if he could get Hennessey to do it on his part, he having made the assignment of it?

Objected to as immaterial, irrelevant, incompetent, calling for conclusions of the witness.

A. I understood Mr. Bacon at all times to be ready to close up the transaction if he could give satisfaction to Mr. Hennessey. As to what interest Mr. Hennessey had I don't know that I ever knew until the time the transaction was completed with Mr. Rogers—about that time—that is, as to the amount of interest.

Q. Can you tell by looking at that bond (handing bond to witness) whether that is a true copy of the bond given to Geo. N. Chittenden?

A. I could not.

Objected to as immaterial whether he could tell or not.

Q. Where is the original bond?

A. I sent it to Mr. Geo. N. Chittenden and don't know anything about it since.

Q. I want to know whether during these three years you speak of—at the time of making the Chittenden contract to Bacon and the sale by Chittenden to Rogers—whether you repeatedly asked Mr. Bacon to pay off his contract and close up the deal, and whether or not he declined or objected or refused to do it.

Objected to as immaterial, irrelevant, incompetent, and the declarations called for would be hearsay.

A. I did and he did. I did constantly endeavor to have the matter closed by the payment of the consideration, and I never was able to secure it.

EDWIN S. CHITTENDEN.

Adjournment was here taken till 10 o'clock October 12, 1887, at which time parties met pursuant to adjournment, and H. J.
247 HORN, called as a witness for defendant, being first duly sworn, testified as follows:

Direct examination by Mr. McCARTEY:

Q. State your age, residence, and occupation.

A. Attorney-at-law, and have been for over thirty years; I reside in St. Paul; have resided there since 1855 & '6.

Q. State if you are acquainted with the defendant, David J. Hennessey.

A. I am.

Q. Are you acquainted with Edward S. Chittendon, attorney-at-law, St. Paul, and were you so acquainted with him in the summer of 1882?

A. I was.

Q. State whether some time about the summer of 1882 Mr. Hennessey placed in your hands for examination an abstract of title to certain lands in Washington Co. which had been contracted for by him and Geo. V. Bacon and Geo. N. Chittendon.

A. I think about that time Mr. Hennessey placed in my hands an abstract for examination for some property in Washington Co., on which there had been a contract made, in which those gentlemen figured in some way. I don't recollect seeing the contract.

Witness is shown paper and asked to state whether that is the abstract that was so placed in his hands for examination.

A. It appears to me to be the same down to 1882. I don't see any marks of identification except the general appearance.

Q. It is your general impression that this is the abstract?

A. Yes, sir.

The abstract is offered in evidence.

248 Objected to as incompetent and immaterial.

Q. What did you do in reference to that abstract?

A. I examined the abstract itself at the request of Mr. Hennessey; I didn't go to the original records.

Q. State what, if any, objections you found to the title to the property described by that abstract.

Objected to as incompetent and immaterial.

A. In No. 6 of this abstract there appears to have been a deed, dated June 20th, 1854, from Neil D. Shaw, by his attorney, S. W. Shaw, to T. R. Cressy of the S. E. ¼ of the S. E. ¼ of section 31, T. 29, R. 21. There was nothing apparent on the abstract or which I could discover showing that S. W. Shaw held a power of attorney to convey that 40 acres to T. R. Cressy. I considered — a serious defect and so informed Mr. Hennessey.

Then there was a mortgage, No. 19, of the abstract from Nathaniel W. Moore and wife to Timothy R. Cressy and, I believe, his wife (the latter is marked in pencil), dated June 1st, 1855, the S. E. ¼ and the E. ½ of the S. W. ¼ and the N. E. ¼ of the N. W. ¼ of sec. 31, T. 29, R. 21. This mortgage appeared to be unsatisfied of record as far as the abstract shows. I considered that also a serious defect, and I so informed Mr. Hennessey. There were some other defects, but

those were the principal ones. I think there was some other minor questions, but those were the main points.

Q. You think those were the two defects you insisted upon?

A. Those were the two defects I considered important.

Q. Look at No. 23 of this abstract.

A. Yes; I noticed No. 23.

249 Q. Did you notice that in No. 23 the mortgage was assigned to Mr. Sanborn?

A. Yes; I noticed; dated April 6, recorded April 14, 1882.

Q. Also notice 24 of this abstract?

A. Yes; I noticed that.

Q. State whether you consider the assignment in No. 23 and the power of att'y in No. 24—whether they affected the question as to the continued existence of this mortgage.

Objected to as incompetent and immaterial.

A. Yes; I recollect about that; it was (as I understood from the abstract or some other way) that Gen. Sanborn claimed that mortgage, and I considered that made the objections more serious as an adverse claim.

Q. State whether you had a conversation or conversations somewhere about that time with Mr. E. S. Chittenden in reference to this title.

Objected to as incompetent and immaterial.

A. Well, Mr. Chittenden came to see me several times in reference to these objections; he was informed about them, I think, by myself.

Q. State whether you called attention to these objections you have mentioned.

A. Yes.

Q. Those were the two serious defects?

Objected to as incompetent and immaterial.

Q. What was the substance of the conversations?

Objected to as incompetent and immaterial.

A. I can't recollect, except the general tenor was Mr. Chittenden expected to remedy it. I don't recollect what he said, but he thought he could find proof of the satisfaction of the mortgage and about this lack of power to make that conveyance. I think he had that under investigation. It was referred to me, and that is the way it was left. He seemed to be endeavoring to fix up the title—to find out how to fix it. I can't remember the words. The talk was very short, but that was about the tenor or the drift of the conversation.

250 Q. In what you did in reference to that and in your conversations with Mr. Chittenden, state if you were acting as counsel for Mr. Hennessey.

Objected to as immaterial and incompetent.

A. Yes, sir; I was acting as his counsel at the time.

Q. I will ask you whether you ever received any information that this title had been cleared.

Objected to as incompetent and immaterial.

A. I don't recollect having heard anything of that kind.

Q. Or was any deed ever offered you on behalf of Mr. Chittenden for Mr. Hennessey?

A. There was no tender to me, but whether anything was offered I can't say.

Q. Do you think, if you had been informed by Mr. Chittenden or any one for him that this title had been cleared or that they were prepared to pass the title, you would have remembered it?

Objected to.

A. I think I would. I do not think there was anything of the sort offered to me.

Q. Do you remember receiving a report or memorandum from Mr. Hennessey of an examination of the records made by Mr. Hennessey which you used in connection with that abstract?

A. Yes; I think Mr. Hennessey did furnish me with some memorandum of his own examination or investigation; I think he did.

Q. And you considered that in connection with your examination of the abstract?

A. Yes, sir; I did.

Q. Did you inform Mr. Hennessey of these two objections to the title and give him your opinion as to what effect they would have upon the title?

Objected to as incompetent & immaterial.

A. I think I have already stated that I informed him and advised him substantially that they were serious defects to the title.

Q. Do you now consider that they were?

A. I have not changed my opinion. My attention has not
251 been called to it for a long time, but as I recollect it, according to the condition the title was in then, my opinion is the same as to its condition at the time I examined it. I don't know what has been done since.

Cross-examination by Mr. LUSK:

Q. You say that Mr. Chittendon informed you or showed you in regard to the mortgage being paid?

A. No.

Q. What was it you said about that?

A. I didn't state that. I said that Mr. Chittendon was endeavoring to find evidence of payment or wanted and hoped to.

Q. I was thinking that after that you said he was asked if that mortgage was paid, and he so informed you.

A. I don't recollect that. He may have given me the understanding that that was his belief, but I don't recollect that he said

it had been. My recollection is that he was endeavoring to find proof or thought he might find proof of the payment of the mortgage.

Q. That was in 1882?

A. Yes; I think so, although I cannot fix it within a year. I judge so from the appearance of the abstract.

Q. Can you state what time of the year that was—spring, summer, fall—something like that?

A. No; I don't think I can fix the time.

Q. Did you have anything more to do with it?

A. Nothing more than that; it remained for quite a time (and I think Mr. Hennessey's memorandum also) in my possession, and Mr. Chittenden had several interviews—I can't say how many—going over quite a considerable length of time.

Q. Didn't it extend (or don't you recollect) over a space of three years?

A. I couldn't say. I know it extended quite a time.

Q. Do you recollect that Mr. Chittenden kept insisting the title was all right and asking Mr. Hennessey to pay up and take his deed, and Mr. Hennessey kept insisting, according to your advice and his own investigation, that it was not all right, and he wouldn't take it; wasn't that the situation for about three years?

252 A. No; I don't think it was. I think the impression I got was that Mr. Chittendon thought he could obtain evidence to show that the mortgage was paid, or that he wanted and hoped to do that.

Q. Did it not take three years to do that?

A. I couldn't tell. I didn't pay much attention.

Q. Your attention has not been called to this matter since until when?

A. It has not been called to it, I think, for a considerable length of time.

Q. Give something more definite. Your attention has not been called to it within three years, four years, five years?

A. Well, perhaps a year or two or more. I can't say exactly.

Q. Your recollection is not distinct, then, in regard to the conversations you had with Mr. Chittendon and what he claimed?

A. Well, not quite, but merely the general tenor and substance of it.

Q. You understood Mr. Hennessey refused to take the deed in the situation the title was in and pay the money? You understood that, didn't you?

A. I understood that he was not satisfied with the title and expected it to be perfected.

Q. And he wouldn't take the deed and pay the money until the title was perfected to suit him?

A. I don't know that anything particular was said about that; it was a matter of inference.

Q. Didn't you advise him?

A. I advised him that those were serious objections.

Q. Did you advise him not to take the deed until the objections were remedied?

A. I don't think there was anything of that kind said by me.

Q. You naturally would advise so, wouldn't you?

A. I don't know. Those matters an attorney usually leaves to his client. I don't recollect having anything more to do with it than to look at the title and inform Mr. Hennessey of these
253 objections—how many of them I considered serious. That was all. From the interviews I had with Mr. Chittendon afterwards I got the impression all along that he was endeavoring to perfect the title or, if not to perfect it, to satisfy him that the objections were not serious.

Q. You didn't hear any of his conversations with Mr. Hennessey?

A. None that I recollect. My impression is I did not. I don't recollect.

HENRY J. HORN.

254 DAVID J. HENNESSEY, produced as a witness on his own behalf, being first duly sworn, testifies as follows:

Direct examination by Mr. MCCARTEY:

Q. State if you are the defendant in this case.

A. Yes, sir; I am.

Q. Do you know the plaintiffs?

A. Yes, sir; I do.

Q. How long have you known them?

A. I have known Mr. Bacon since 1882; Mr. Rogers, probably since a little earlier; I don't know; about the same time.

Q. Do you know Mr. E. S. Chittendon, of St. Paul?

A. Yes, sir; I know Mr. Chittendon.

Q. How long have you known him?

A. I first saw him in 1882, to my knowledge.

It is admitted that Exhibits "A" and "B," attached to the cross-bill, are in evidence.

Q. You are the party to whom this contract, Exhibit "B," was made by Mr. Bacon?

A. Yes, sir; I am the person to whom a contract substantially the same as Exhibit "B" was made by Geo. V. Bacon and Charrie E. Bacon, his wife, on the 27th day of June, 1882.

Q. Look at this abstract (abstract, Def't's Exhibit "A," shown witness) and see if you have ever seen it before to-day—whether you ever had it in possession.

A. I received an abstract of title to the lands involved in this case some time after the purchase by me of the Chittendon-Bacon contract, and I believe this to be the abstract, from the marks (pencil marks) thereon in my handwriting—this abstract—which are, "Where did conveyer get any power?" These words are in my handwriting; also the pencil marks at No. 5 of the abstract, which are nearly obliterated, but I can read, "Was Shaw married"—the

balance would appear to be (but I am not certain)—"at the time he made this conveyance?" The latter words are so imperfect I can only see "conveyance," but the writing is in my hand; also
255 at No. 9 the words "Signed, T. R. Cressy, Timothy R. Cressy," in the body of deed and "back" (meaning acknowledgment) are in my handwriting, in pencil. The last refers to the deed as recorded, showing Cressey's signature by his initials, whereas his name is in full in the body of the deed and acknowledgment. The pencil marks at No. 19 (there is some writing in pencil marks there) are not in my writing. Those I don't believe were in the abstract when I saw it; also pencil marks at No. 20 are not in my handwriting, and I don't know if those were in the abstract when I saw it. The pencil marks at Nos. 5, 7, & 9 are the only ones in my writing—the only ones made by me—as the abstract at present shows. From these pencil marks I believe this to be the abstract I received, for the reason that I never had any other.

Q. Do you remember of whom you received it?

A. I can't say for certain from whom I received it; either from Mr. Chittendon or Mr. Bacon; I can't say for certain which.

Q. You mean E. S. Chittendon?

A. E. S. Chittendon.

Q. Did you ever receive more than one abstract as abstract of title to this property?

A. I never received but one.

Q. This was after you made the contract with Bacon?

A. After I made the contract with Bacon.

Q. What did you do with this abstract after you received it?

A. I went over to Stillwater and examined the records as to the instruments referred to in the abstract.

Q. Stillwater is the county-seat of Washington county?

A. The county-seat of Washington county, where these lands in controversy are situated.

Q. Did you make examination of all the records of title referred to?

A. I examined all the instruments referred to in this abstract and made such notes of irregularities and anything else that struck me as the instruments of record.

Q. What did you do with the notes and with the abstract after you made the examination?

256 A. I presented them to Mr. Horn; furnished them to him to examine the title and report on it to Mr. Chittendon.

Q. Have you ever had the abstract since you delivered it to Mr. Horn?

A. I couldn't say positively whether I ever had it after delivering it to Mr. Horn. The abstract which Mr. Horn looked over was passed to Mr. Chittendon for correction of the title.

Q. State if Mr. Horn reported to you, after the examination of the title, in regard to any defects in the title.

Objected to as incompetent and immaterial.

A. Mr. Horn reported to me that the deed in No. 6 of abstract,

made by S. W. Shaw, as attorney for Neil D. Shaw, to Timothy R. Cressy, which bears date June 20, 1854, recorded Aug. 5, '54, in Book "D" of Deeds, pages 582 & 583, register of deeds office, Washington Co., did not appear to be authorized; that there was no power of attorney apparent in S. W. Shaw to make that deed, and that his lack of power created a serious cloud on the title to the lands mentioned in the deed and sought to be conveyed by it. Mr. Horn also said that the mortgage mentioned in No. 19, running from Moore and wife to Timothy R. Cressy, appeared unsatisfied, and appeared assigned, by Nos. 23 & 24 of the abstract, to John B. Sanborn, and that that mortgage, as it appeared on the abstract, was also a serious cloud on the title.

Q. State whether you informed E. S. Chittendon at any time that Mr. H. J. Horn was your counsel and said to consult him in reference to the title.

A. I informed E. S. Chittendon that Geo. Y. Bacon and Mr. Horn had examined the title for me and found the two defects mentioned, and that he considered them serious and material, and that they ought to be removed.

Q. State whether you referred Mr. Chittendon to Mr. Horn for what, if anything, he was to do in regard to the title.

A. I referred Mr. Chittendon to Mr. Horn in regard to all matters that appertained to the title. I had one interview with Mr.
257 Chittendon subsequent to the 27th of June. That interview occurred casually, on the street, I think on 3rd St. We met on the street, and Mr. Chittendon, I think, requested me to call at his office to talk the matter over regarding the trouble with the title. I told him Mr. Horn had that entire matter in charge for me; that he was my attorney in the case, and to see him regarding it; that personally I could do nothing at an interview; I knew nothing about it, but whatever arrangement Mr. Horn made would be entirely satisfactory to me.

Q. State if at that time, or at any other interview you had with Mr. Chittendon, Mr. Chittendon assured you that he would clear the title, or what he said he would do in regard to it.

A. Mr. Chittendon told me that he was desirous to clear the title, and would clear it. There was some conversation, as I have said. He requested an interview with me at his office in regard to it, without specifying what he wished, except in a general way, and I stated to him that I knew nothing about the title, and *he* could do nothing at such an interview with him personally; that the matter was in Mr. Horn's hands, and he had reported such defects as he regarded to be material—two defects.

Q. In connection with that state what, if anything, you did immediately after you entered into this contract with Geo. V. Bacon regarding its performance.

A. When I bought the Bacon contract, the Chittendon-Bacon contract, running to Geo. V. Bacon and wife, I paid Geo. V. Bacon $100, and on the afternoon of the 27th of June, 1882, the day of my purchase of said contract, I made a tender to E. S. Chittendon, as agent of Geo. N. Chittendon, of $4,400 in U. S. or legal-tender notes,

in his office, and stated to E. S. Chittendon that I made that tender in fulfilment of the obligations of the Chittendon-Bacon contract, not on the part of the grantee of that contract, but in my own behalf, as the then owner of the contract. I said, "Mr. Chittendon, I offer to give you this money," and Mr. Chittendon said that he
258 didn't have the deed to the lands mentioned in the contract, and could deliver none, but that they were trying to procure one; he didn't know how soon he could get it—how long it might be. I left the office and had no further interviews with him, save the one when we met on the street.

Q. Was it after that tender or before that tender that you received the abstract of title?

A. After the tender.

Q. Subsequent to that time was there ever tendered to you any deed of the property in question?

A. No deed was ever tendered to me of title of the whole of the property; a deed was tendered to me of a part of the property from Edward G. Rogers and wife and given to me subsequently.

Q. I mean was there a deed tendered to you either by Chittendon or Bacon running from them or either of them.

A. There never was any deed tendered to me running from Geo. V. Bacon & wife to me nor from Geo. N. Chittendon & wife to me nor from Bacon and Chittendon.

Q. Was there ever any deed tendered to you under this contract, under the Bacon contract, or under the contract with Bacon?

A. No, sir; there was not.

Q. How many conversations did you have with E. S. Chittendon in regard to this title, in regard to the title at all, prior to the commencement of this suit?

A. I don't remember that I had any conversation with him in regard to the title to the property involved in this suit save the one I spoke of on 3rd St. There was no question regarding the title at the time of the tender, and I only remember two interviews.

Q. One at which you made tender and the other where you met him casually on 3rd St. and referred him to Mr. Horn?

A. Yes, sir.

Q. State if you was ever notified that Geo. N. Chittendon or Geo. V. Bacon were prepared and ready to give you the title.

A. No, sir; I was not.

Q. Under that contract state whether you were always, from
259 and after the time of making that tender, ready and willing to make your payment according to the terms of the contract on your part.

A. I was.

Q. State if you so informed Mr. Bacon at any time or so informed Mr. Chittendon.

A. I so informed Mr. Bacon frequently.

Q. I understood you to say that in your conversation with Mr. Chittendon you told him that as soon as he satisfied Mr. Horn in regard to the title you were ready to perform your part of the contract.

A. I don't remember whether I stated that there or not, but it is the fact. I did so inform him.

Q. Now, in fact, have you always been able to perform that contract—have you always had the money ready?

A. I have always been ready to meet my obligations under that contract.

—. What was the reason (if you know) why you did not obtain it?

A. There appeared to be two reasons. One of them was that the parties were or appeared to be waiting to remedy the defects mentioned; I mean the defects that Mr. Horn considered material; the other was an apparent unwillingness on the part of Geo. V. Bacon to have the title conveyed to me. I speak of the clear title.

Q. Will you now relate the conduct of Mr. Bacon towards you in reference to that title; the conversation with him in reference to it; what he said and did?

A. I had various conversations with Mr. Bacon regarding the transaction after the 27th of June, 1882, down to the summer of 1885. At most of these conversations Mr. Bacon was endeavoring to persuade me to surrender my contract to him and permit him to take the title in his own interest—to take the title to the land for himself.

Q. What did you say in reference to that?

A. He wished to have the land, as it had materially increased in value, and I was rich and he was poor, and it was a very small matter to me, and it would be very desirable for him to get the property, and he didn't want the trouble of clearing the title for me.

Q. Was that the substance of his language?

260 A. That was his language in substance.

Q. What answer did you give to those solicitations?

A. I declined to surrender my title. At one time he wanted an interest in the property and made some kind of a proposition to this effect: That he would take the title from Mr. Chittendon, get Chittendon to remedy the title, correct the defects in the title, and give me a year or 18 months or something like that—some particular length of time—in which to take a half interest, paying him half of the purchase-money—that is, he would give me an option, let me have an option for a given time to go in and take a half interest, he advancing the money in the first instance—a proposition that nothing ever came of. Excuse me; I wish to say here that Mr. Bacon wished me to see Mr. Chittendon in regard to the difficulties of the title and talk the matter over, and I referred him to Mr. Horn. There could no good come from any interviews with me. Let them clear up the difficulties, and I was ready to carry out my part of the contract, if he wanted to act in good faith, and remove those defects from the title—clear the title of these clouds; he could do so and would always find me ready to discharge my obligations.

Q. State if you had any conversation with him (Bacon) in which he expressed an intention not to let you get the title to that property.

A. In the summer of 1885 I had an interview with Bacon in regard to the matter of this property, and during that interview he told me that he wouldn't clear the title in my interest, and that he would beat me out of it—"would beat"—I repeat his words—would beat me out of it if he could. That, as near as I can remember, was about June, 1885—the early part of the summer of 1885.

Q. State when you first found that that title had passed from Geo. N. Chittendon to Edward G. Rogers.

A. The first intimation I had of it was late in the fall of 1885,
and was given by a letter from Mr. Rogers addressed to me
261 at Dubuque, Ia. Mr. Rogers notified me of having bought
it from Mr. Chittendon, and he wished some arrangement to be made to effect a settlement. He didn't care to fight; would pay something rather than fight. That is the first intimation I had of it.

Q. Will you go on now from that time—the time that you discovered that Mr. Rogers had acquired title—and state Mr. Rogers' connection with the matter and your dealings with him in connection with it?

A. I received that letter somewhere about Dec., 1885; I can't be definite as to the date. I am certain it was in the fall of 1885, and pretty late in the fall. I don't remember of having made him any reply to that letter—that is, any written reply. I believe I didn't make him any reply, but I met him in St. Paul about Christmas of that year, and I think I met him (Mr. Rogers) near the corner of 3rd and Jackson St., and we talked regarding the matter. He referred to having written to me, and I informed him that I had received his letter, and that I intended coming up and had for that reason written no reply. Mr. Rogers repeated to me substantially during that conversation what he had written, he taking the position that my contract was a cloud on his title and I taking the position that his deed was a cloud on my title, and we couldn't settle anything between ourselves. He would hold his position and I would hold mine, and it looked as if the court would have to settle it between us. He informed me, as far as I can recollect, at that time of his purchase of the Sanborn claim on this title.

Q. What did the Sanborn claim consist of—what was the Sanborn claim?

A. The Sanborn claim, as I now understand, was the claim he had under these two clouds—the assignment of the Moore-Creesy mortgage and the deed from Shaw; but I understood, I think, at that interview from Mr. Rogers that he held the Sanborn claims under the mortgage against the property and he would hold the property on these as far as they went, and he wanted me to make
some proposition to him. I declined making any, but I be-
262 lieve I stated that in the interest of peace and rather than
to undertake vexatious litigation I might entertain and would entertain some proposition, but no proposition that would be made to me on the grounds he spoke of. He was speaking of giving me some little thing, a little more than just the cost of the suit, or something—some small matter; I don't remember what it was; that

I wouldn't accept any such proposition as that, but I might entertain a proposition based upon my own claims. Subsequently I believe I received some proposition from Mr. Rogers, I think by letter, in which he offered me, as near as I can remember, $1,000 for a quitclaim deed. That proposition I declined, and during the spring of 1886 I think I had a number of letters from Mr. Rogers—perhaps three or four; I don't remember—in regard to it, calling on me for a proposition or arrangement in regard to it or he would bring suit.

Q. Now state what, if anything, Mr. Rogers said in regard to the validity of the titles and claims that he had obtained—the Sanborn claims that he claimed to own under. State the conversation in regard to that, and what, if anything, he said about the payment of interest, as fully as you can.

A. He told me he could hold title under the Sanborn claim to that extent anyhow, and, assuming that his deed from Chittendon did not amount to anything, he had a valid claim under the Sanborn purchase.

Q. Did he mention the mortgage and the deed from Sanborn?

A. He mentioned both at various times. I remember specially an interview in his office, at which you were present, in which he claimed to be able to hold under the assignment to him of the Sanborn mortgage and from the deeds he had from Sanborn. I don't remember that I knew at the time what interest he held from Sanborn.

Q. State whether or not he said anything about Bacon or about Bacon having anything to do with this title.

A. He said he had not.

Q. Give his language, as near as you can, or the substance of it in reference to Bacon.

263 A. Well, in all his conversations with me he claimed to be the owner and sole owner of the title, except myself.

Q. Did he specially mention Bacon?

A. He excluded Bacon. He mentioned Bacon. I claimed under Chittendon & Bacon; stated that I had title under the contract of Geo. N. Chittendon & Geo. V. Bacon to myself, and that Mr. Rogers purchased, if he did purchase, the property with the knowledge of these rights, and that his purchase did not amount to anything. I was owner. On this point we didn't agree, and there appeared to be no chance of any agreement, if we talked forever, on that score, and he insisted that however the court might hold as to that part of it he could hold the title under the assignment of this mortgage from Sanborn—the mortgage that Sanborn had held—and that his title to that extent was good, and also, I think, to the 40 acres; that he had the title to that 40 acres. I don't think I knew whether he got that title directly from the owners. I don't remember the names of the parties. I haven't seen the abstract, and my recollection is rusty as to the names.

Q. About what time was it Mr. Rogers said he would bring suit against you to remove the cloud on the title?

A. I think he said that at one of our interviews that in case he couldn't effect a settlement he would bring suit.

Q. How many interviews did you have with Mr. Rogers before you finally obtained a deed to the half interest in this property—a quitclaim deed?

A. I couldn't state how many interviews I had with him. I saw him several times and had, as I said, several letters from him.

Q. Now, in the arrangement you finally had with Mr. Rogers what did you do and say from the first as to making the deeds between you and Mr. Rogers?

A. Mr. Rogers made me a quitclaim deed, executed by himself and wife, to an undivided half of the lands in controversy, for which I paid him $2,750, and I made him a quitclaim deed
264 to an undivided half. These deeds were made about the latter part of March or early in April, 1886, I think.

Q. At the time those deeds were made what, if any, papers or documents regarding the title were delivered for record by Mr. Rogers aside from the deeds you have mentioned?

A. At the time of making the deeds there were none.

Q. About the time?

A. Before this I think Mr. Rogers gave me about seven instruments, seven papers, before those deeds passed.

Q. (Paper shown witness.) Will you look at this abstract and identify those papers set up in that abstract?

(Witness does so.)

Q. Now, what was the inducement to this transaction, the deed that you made to Mr. Rogers of half the interest in that property? What induced you to make him a deed to that interest?

A. I couldn't say. There was two or three things that induced me, I may say.

Q. State what they were.

Judge LUSK: I object to any testimony now in connection with that settlement until the witness states whether it is in writing, and, if so, where that writing is.

Q. State whether or not any general representations were made to you by Mr. Rogers which induced you to make this deed to Mr. Rogers conveying a half interest in the property in question.

A. I was induced or influenced to make that deed or to convey that half interest by the statements which Mr. Rogers made me to the effect that the interest which he held in the title to the lands under assignment of the mortgage from Moore (as I understood it) to Creesy made him by Sanborn, and under some instruments—I can't state what they were or whence they were—to these 40 acres, that he could hold title to that extent anyway; that there was no evidence of any account by which he could be divested of that title, and I think he told me he paid Mr. Sanborn $1,000, and referred me to Mr. Sanborn for the truth of that statement, if I ques-
265 tioned it.

Q. Did you at the time of that arrangement with Mr. Rogers have any knowledge of any collusion or any information in regard to any collusion between Mr. Rogers and Mr. Bacon in procuring that title to be conveyed by Geo. N. Chittenden to Mr. Rog-

ers, or did you have any knowledge or information that Bacon had been or was in any way interested in the title which Mr. Rogers claimed to hold at that time?

A. I had no information of any kind as to any collusion between Mr. Rogers and Mr. Bacon at that time, and I had no knowledge of the transaction between Mr. Bacon and Mr. Rogers in regard to the giving of a deed from Geo. N. Chittendon to Mr. Rogers, nor any information regarding the details of that transaction whatever. I was totally ignorant of the whole transaction; had no knowledge of it save what I acquired from Mr. Rogers himself, save the confirmation of Mr. Rogers by Mr. Bacon.

Q. What was that?

A. That was, as near as I can recollect, about the 17th of March, 1886.

Q. What did Mr. Bacon say?

A. Mr. Bacon said, I think, that he had no interest in it except that $100, and he didn't intend to give that up if he could help himself. I spoke to him in that interview of March, 1886, on the st., and he said he had no interest except the $100, and he wouldn't give that up if he could help himself.

Q. You have heard the testimony of Mr. E. S. Chittendon, have you not, which he has given here in this case as a witness for defendant?

A. Yes, sir; I think I have. I say I think I have for the reason that the question is in reference to his entire testimony, and a question may have been asked when I was out of the room.

Q. You were present at the taking of his testimony?

A. Yes; I heard it in the main, but wouldn't be absolutely certain as to whether I heard every word of it.

Q. Had you known of the facts testified to here by Mr. Chittendon in regard to Bacon and Rogers obtaining this title, would you have made this arrangement with Mr. Rogers in which he deeded to you a half interest in the property and you deeded to him the other half interest?

Objected to as immaterial and incompetent.

266 A. I most assuredly would not.

Q. Now I will ask you if the representations of Mr. Rogers to you that you have related and the representations made to you by Mr. Bacon that Bacon had no interest in this property were part of the inducements which induced you to enter into this agreement with Mr. Rogers?

Objected to as incompetent and immaterial.

A. The radical reason for entering into that stipulation with Mr. Rogers was the representation that he could hold the title under these instruments.

By Mr. ROGERS:

Q. Do you mean the instruments I got from Sanborn?

A. Yes.

Q. That is your radical reason why you consented?

A. Yes; and my inability or want of knowledge to prove anything; my inability to prove anything to the contrary, lack of knowledge to gainsay.

Q. Did you have any knowledge, any evidence, by which you could show the invalidity of this title or these titles that he claimed to have obtained from Sanborn?

A. Not a particle; and he assured me that there wasn't any.

Q. When did you discover the facts which led you to believe that Mr. Bacon had been connected with that title after Mr. Rogers had acquired it?

A. The first knowledge I had of Mr. Bacon's connection with that title was after my settlement with Mr. Rogers, was about the month of August or Sept., 1866—maybe Sept. It was somewhere about August or Sept. Mr. Rogers met me and told me that he had transferred the property to Mr. Bacon, and that Mr. Bacon wanted it partitioned, and wanted to know if I didn't want it to be partitioned—something of that kind.

Q. Did you know the value of this real estate in 1882, and did you ever know its value at the time it was deeded to Mr. Rogers, and have you known its value all the time since? Meem.

A. Well, sir; generally.

267 Q. What was its value at the time you made this contract with Mr. Bacon?

A. Opinions at that time might vary in regard to its value. I regarded it as worth what I agreed to pay for it, $4,900. I agreed to pay Mr. Bacon $500 over and above the $4,400 stipulated with Mr. Chittendon, and I considered it a good purchase at that. What price under particularly favorable circumstances could be obtained for it might be a question. Mr. Bacon was not able to sell it, as I understood, for any more than I paid. Mr. Bacon had offered it to several others and hadn't been able to get any more than I gave for it, so, perhaps, what I paid at that time might be considered its cash value then at an all-cash sale. I considered it a good purchase. I wouldn't have bought it unless I did.

Q. What was its value at the time Mr. Rogers bought it of Geo. N. Chittendon?

A. That, if I remember, was in the fall of 1885. In the fall of 1885 I would consider the property, as a whole, worth $100 an acre; subdivided into five-acre lots, sold in five-acre lots, from $150 to $175 or $200 an acre.

Q. In gross, what would that be—the market value of the whole piece of land?

A. Taken as a whole or subdivided?

Q. I want to get at the best value he could obtain. I want to have the estimate.

A. The value, subdivided and sold in subdivisions, I would consider would be very safely estimated at about $40,000, from that up to $50,000. Sold as a whole in one tract I should consider it worth, perhaps, $28,000 or $30,000. You wouldn't get as much sold that way as you would the other way.

Q. Do you know about what time Mr. Rogers deeded the property to Mr. Bacon?

A. I do, sir; that is the time Mr. Rogers told me. I have testified it was about Aug., 1886. It was about that time; I couldn't give the exact date, but some time in the summer—the summer of 1886, about August. He told me at the time he transferred the property to Mr. Bacon that Mr. Bacon wanted the property
268 partitioned and would like some proposition for it from me if I was willing to make some proposition; that it was for his interest to have it divided.

Q. You had information about that time, had you not, that a deed to a quarter interest had been given by Mr. Rogers to Mr. Bacon for the expressed consideration of $100, did you not? You found that to be a fact?

A. This thing I learned first from the records at Stillwater, the county-seat of Washington county, on examination of the title. Mr. Rogers also told me subsequently. I didn't go to Stillwater until I received the notice of partition; then I went over and examined the transaction between Mr. Rogers and Mr. Bacon.

Q. That was the notice of suit?

A. Yes; as I understood it, Mr. Rogers was not then in the case. It was the case of Bacon against me for partition.

Q. You observed, then, that one of the deeds was to an undivided quarter, Mr. Rogers to Bacon, for an expressed consideration of $100, did you not?

A. I saw there was a deed made to Mr. Bacon by Mr. Rogers and wife—I think to G. V. or Geo. V. Bacon, I don't remember which it reads—bearing date the 17th or 18th of March, 1886—a quitclaim deed in which the consideration mentioned was $100. The deed—I am certain of this; it is not a mere matter of recollection—I am certain the deed was acknowledged in California—a quitclaim deed to an undivided one-quarter, I think, of the whole lands. There was another deed, dated in August, I think, of the same year—Aug., 1886—between the same parties—that is, Mr. Rogers, E. G. or Edward G. Rogers and wife to Geo. V. Bacon, as near as I can recollect—to an undivided one-quarter in which the consideration expressed was $100,000, and it was a warranty deed.

Adjournment was here taken to 2 o'clock.

269 OCTOBER 12, 1887—2 o'clock p. m.

Examination of DAVID S. HENNESSEY continued:

Q. Will you state the conversation, if any, that Mr. Bacon had with you regarding his financial condition and ability to raise money to pay upon his contract with Geo. N. Chittendon, prior to or about the time that you made the purchase of that contract in 1882?

A. My recollection is that Mr. Bacon spoke to me regarding that purchase before the 27th of June, meeting him in a casual way on the street, and urged me to buy it from him. I declined, however, to do so at the time. On the 27th of June he asked me again, and

told me the matter was pressing; that he had to make tender that day, and that he had been to Mr. Robert A. Smith and, I think, Mr. Dawson and some others in regard to sale of the contract or procuring money with which to make tender for himself, and had failed. He asked me to furnish him the money to make the tender on his own behalf. I declined to do it. He told me he didn't have any money and couldn't get it, and that unless he could procure it in some way he would forfeit the contract, but that if he could get the money it would be all right. He stated to me, I think, that the deed had not arrived. I declined giving him the money, but finally, as I have already testified, bought the contract and made a tender for myself on the same afternoon—the 27th of June, 1882.

Q. State what was the financial condition of Mr. Bacon, as far as you know, independent of what he told you.

A. I only know by what he told me and by general repute.

Q. What was it by general repute?

A. He wasn't worth anything at the time. His wife had some property, as I understood, but I didn't know of his having anything.

Q. State what, if anything, you know in regard to Mr. Bacon's financial condition in the fall of 1885, at the time that Mr.
270 Rogers obtained the deed of this property in question.

A. In 1885 it was pretty generally understood that Mr. Bacon's circumstances had materially improved, and that he was the owner, I think, of considerable real estate in some place or other—owner or part owner—had made some purchases and had some interests. He represented himself to me about that time as being in pretty fair financial condition, and I had no reason, from personal knowledge or general reputation, to discredit his representations in that regard. I was aware of a number of purchases of property he made from time to time from seeing the transfers and talking with others.

Q. He was considered in 1885 responsible and able to carry out his contracts, was he?

A. He was so represented to me, and wanted me, in 1885, to retire from the transaction and let him take the title in his own interest and behalf and settle with Mr. Chittendon for it.

Q. State whether, at any time prior to your settlement with Mr. Rogers, you made a specific demand upon Mr. Bacon to carry out his contract with you—to give or procure a deed under that contract.

A. Yes; I made such specific demands. I remember distinctly making one on the afternoon of March 17th, 1886.

Q. Was that prior to your final arrangement with Mr. Rogers?

A. It was.

Q. State what was said and done upon that occasion between you and Mr. Bacon.

A. I remember Mr. Bacon and Mr. Rogers coming out of this building (the Nat'l German-American Bank building), and finding the two together, Mr. Rogers and Mr. Bacon, I stopped them and demanded that the matter of my contract be carried out—my con-

tract with Bacon—in good faith. Mr. Bacon abused me on making the demand, and finally assaulted and struck me.

Q. Who was present at the time?

A. A number were present at the time he struck me. A crowd had collected around, and several persons in the offices down on the first floor or basement, whichever it is called, were observing
271 from the window. There was quite a crowd collected on the sidewalk.

Q. State whether it was at that time or some other time that Mr. Bacon stated that Rogers had bought the property; that he, Bacon, had no interest in it, nothing to do with it.

A. Bacon stated positively, as I have already testified, that he had no interest in it whatever, except the $100, and that he wouldn't pay that if he could avoid it in any way.

Q. State in what connection, whether that hundred dollars has ever been paid to or tendered to you.

A. No, sir; it never has.

Q. And it is still retained, so far as you know, by Mr. Bacon?

A. Still retained, as far as I know, by Mr. Bacon. I have no direct knowledge of it.

Q. Now, let me know whether, at the time of your arrangement of this title with Mr. Rogers—this settlement with Mr. Rogers—you was informed or knew whether or not the title to this 40 acres of the property in controversy had been obtained by Mr. Rogers of J. B. Sanborn or whether you knew where he obtained that title. State what you know about that.

A. At what time?

Q. At the time you made that agreement with Mr. Rogers, when the deeds were passed between Rogers and you.

A. At the time of the settlement with Rogers I understood from him that he held a title from some source to 40 acres. Through the party for whom the attorney made the deed or through his heirs he claimed to hold a title to that 40 acres the attorney made the deed to, adverse to me and to Mr. Chittendon, and he also claimed to hold the assignment of this Moore-Creesy mortgage, but whence he had the title to that 40 I, of course, didn't know.

Q. I understand you to say, then, that you was not informed and did not know that he had got the claim to that 40 acres through Sanborn, but you was informed and told by him that he had obtained the assignment of the right of Mr. Sanborn to this mortgage which was a cloud upon the title.

272 A. I knew he held from Sanborn the title to this mortgage, because I knew the title was in Sanborn. The abstract that was furnished me showed that.

Q. This abstract you have mentioned before?

A. Yes; the condition of that, so far as I understood, was solely derived from the abstract, and the abstract showed that mortgage to be in Sanborn, and I understood from Mr. Rogers that he had acquired Sanborn's interest. I knew all along that Sanborn had held that claim, and understood from Mr. Rogers that he had acquired the other from the proper parties—who they were I did not know—

the title to the 40 acres which was in him; those conveyed by that attorney's deed.

Q. You didn't know, then, from him that he acquired the title to the 40 acres nor how much he paid for it, but you knew he told you he paid Sanborn $1,000?

A. I knew this: that he claimed to have paid. I did not know that he had paid anything.

Q. You was informed by him that he had paid $1,000 to Sanborn?

A. I understood he paid Mr. Sanborn $1,000, and he made some statement of the cost to me; I don't remember how much it was. I think the statement he made to me regarding the Sanborn matter was that he paid him $1,000.

Q. When and in whose presence and where was the statement made to you by Mr. Rogers that he had this claim of Mr. Sanborn's, and that he held that as against the property?

A. He told me that repeatedly, and told me on the morning of the settlement in his own private office—this building, the German-American Bank building—in his inner office. He has two rooms, as I remember, and in the inner of the two rooms I saw him by appointment. On the previous afternoon, the time Bacon assaulted me, after Bacon assaulted me, he appointed a meeting the next morning, and I met him by appointment in your presence in the private office, and he stated then that he could hold the property
273 under Sanborn's mortgage. I was insisting on my claim—the soundness of my claim under the two contracts—the Chittenden-Bacon contract and the Bacon-Hennessey contract.

Q. Did you at that time know of the existence of any evidences showing payment of the Sanborn mortgage or its satisfaction, showing it was not a cloud in any way?

A. I never had had any evidences that it was not. Mr. Rogers insisted positively that there was no evidence, and it was under that circumstance that I was induced to make him the proposition which I did make at the time. The proposition of settlement I made him that morning, I think, was my first proposition. He asked me repeatedly for propositions of settlement, but I never had made him one until that morning. I made him one that morning dividing the property and paying half what I had stipulated to pay Bacon for.

Q. As I understand you, among the inducements to making that settlement were these representations that were made to you by Mr. Rogers: 1st, that he had this Sanborn mortgage, which was valid, and he could enforce it against the property, and that he had acquired title from some source—an independent title—to a 40 acres of the property which he didn't get from Chittendon, and that Bacon had nothing to do with the transaction of his acquiring the title from Geo. N. Chittendon, and that your contract was a cloud upon the title, and that he could bring suit and have the cloud removed, and also the fact that you did not know what the real transactions and the real manner of his acquiring that title from Geo. N. Chit-

tendon to Bacon were. Those were the inducements—the leading inducements—for making this stipulation with Mr. Rogers.

Objected to as incompetent and leading.

A. The reasons that I consented to this settlement that I made with Mr. Rogers were the representations that he made to me regarding his hold on the title through the assignment from Sanborn and this title to the 40 acres that he claimed adverse to me and to Chit-
274 tendon. I knew nothing whatever of the matter in which he had acquired the title from Mr. Chittendon at the time. He also insisted that he had no connection whatever with Bacon nor Mr. Bacon with him, and that it was his own individual matter. I wish to add that if I had at the time understood the facts as I subsequently understood them and now understand them that I would on no account have made the settlement that I did.

Q. I will ask you if you were deceived by the representations made by Mr. Rogers?

Objected to as incompetent.

A. I certainly was.

The direct examination of Mr. Hennessey was here dropped for the present, for the reason of Mr. Lawler's necessary absence as ass't district attorney, to attend at the United States court.

Cross-examination by Judge LUSK:

Q. How old are you?

A. I don't know my exact age.

Q. About how old are you?

A. I couldn't say. I am over forty, but just what my age is I don't know.

Q. How long have you been engaged in active business?

A. From about 1866.

Q. What has been your business since 1886?

A. My business was for a portion of that time agent for my brother and in various matters of my own.

Q. What was you agent for your brother in?

A. General matters.

Q. What kind of matters?

A. Various kinds of matters—looking after all his interests.

Q. What were those interests?

A. Some of them were property interests.

275 Q. What kind of property?

A. All kinds.

Q. What was the business you were doing for your brother?

A. It was various—general. I did correspondence for him; I looked after his interests in a thousand and one matters—personal property, cattle, horses. I bought some matters for him and sold some matters for him in Dubuque, Ia., and some outside of Dubuque.

Q. Where did your brother live?

A. In Dubuque, Ia.

Q. How long ago was it you attended to these matters?

A. I was attending to his matters in, I think, the beginning of 1867.

Q. How long did you act in that way as agent for him?

A. Down to 1879.

Q. Were they extensive dealings?

A. I don't know that they were.

Q. Covering real estate and personal property?

A. They covered some real estate and some personal property.

Q. Buying and selling?

A. Yes, sir; I bought and sold.

Q. Now give us some idea of the extent of that business. I don't want to go into details at all, but explain in dollars and cents. You say from '67 to '79 you acted as agent for your brother. During that time how much in gross amount did you handle for him and did your dealings and transactions cover a million, two millions, or $2\frac{1}{2}$?

A. It might have been two millions and a half. I say it might have been.

Q. Would it aggregate more than that?

A. I couldn't say.

Q. No more than that?

A. I say it might; I couldn't tell.

276 Q. Would it aggregate 100,000?

A. It would aggregate more.

Q. Would it aggregate 500,000?

A. It might.

Q. You can't say it would?

A. Well, I couldn't definitely.

Q. In all those sales you couldn't say it would aggregate $500,000?

A. It might.

Q. You can't say it could aggregate that?

A. I couldn't say. I couldn't give a positive, definite opinion. I have no basis.

Q. Did that consist in buying and selling on speculation in real estate and personal property?

A. No; it did not. I didn't buy and sell for him on speculation. He owned considerable property and I sold some and bought some for him. Some of it he holds still, and still will hold for a number of years.

Q. Is your brother very wealthy?

A. I couldn't say. He is credited for a good deal.

Q. What is his estimated worth?

A. I don't know.

Q. What is your own judgment?

A. I don't know what he is worth.

Q. What is your opinion?

A. I couldn't say.

Counsel for defendant objects to these questions in regard to the worth of the brother of witness as wholly immaterial.

Q. What, in your opinion, was your brother worth at the time you was acting as his agent?

A. I have no definite opinion regarding it.

Q. What business were you engaged in in 1879 up to the time you made this settlement with Mr. Rogers?

A. My main business was looking after my own health. My health became delicate in 1879, so as to necessitate my leaving Dubuque. I left Dubuque and came to Minnesota by the advice of my physician.

277 Q. Are you in poor health now?

A. Not in good health.

Q. Were you in poor health in 1885?

A. I was, sir.

Q. So as to impair your intellect any?

A. Not that I know of.

Q. Did you know what you was about?

A. I believe so.

Q. Able to do business?

A. Yes, sir—that is, off and on.

Q. Have you accumulated quite a large amount of property yourself?

Objected to as immaterial.

A. I have.

Q. Can you tell us to what amount?

Objected to as immaterial.

A. The amount of property in value?

Q. In value; all kinds.

A. I make a personal objection to that as immaterial, and decline to answer until it is pronounced by the court to be material.

Mr. McCARTEY: You were able to carry out what you contract for, were you?

A. I was.

Q. Do you refuse to answer that question?

A. I decline to answer it until required by the court.

Q. In March, 1886, you made this settlement with Rogers?

A. Yes, sir.

Q. At that time and for a long time previous to that time had you been dealing largely in real estate?

A. I had, some; yes; to some considerable extent.

Q. You had bought and sold for over two years largely in real estate?

A. No, sir; I have not stated that nor do I now state it.

Q. I ask you the question.

278 A. I say to that, no. I say I had been to some considerable extent.

Q. How many acres of land in the twenty years previous to 1886, at the time you made this settlement with Mr. Rogers, had you purchased for yourself and others? Give a rough guess.

A. I have no idea.

Q. Is it so large that you can't tell?
A. No, but I cannot remember the transactions.
Q. It would reach into thousands, of course?
A. More than one thousand, of course; yes.
Q. How many thousands?
A. I couldn't say how many thousands. I will say it is more than one thousand.
Q. Why not just state that as it is, and that you have dealt largely and extensively in real estate?
A. I consider your examination is entirely unwarranted.
Q. It isn't your business to tell us how to cross-examine you. I ain't going to argue with you. I am going to ask questions and you can answer or refuse as you see fit.
A. I wish to make a statement.
Q. Have you ever been a lawyer?
A. Do you want me to answer as a witness? No, sir.
Q. Haven't you been in the habit of drawing your own conveyances to quite an extent?
A. I have drawn some conveyances and some contracts.
Q. Didn't you draw the contract in this case—didn't you and Mr. Bacon draw it?
A. Mr. Bacon wrote the contract.
Q. Did you dictate it?
A. I did.
Q. Haven't you been in the habit of drawing contracts, deeds, mortgages, and papers relating to real estate?
A. I have drawn a number of deeds and perhaps mortgages and papers relating to real estate.
Q. Haven't you done a good deal of that kind of work?
A. I couldn't say I have done a good deal of it. I have
279 done some of it.
Q. Have you done that kind of business in connection with real-estate transactions for over 20 years?
A. I am rather inclined to think I have not.
Q. Have you for over 15 years?
A. I am uncertain.
Q. Have you for over ten years?
A. I may have drawn some as far back as ten years.
Q. Have you been accustomed to looking about titles to real estate any?
A. No, sir; not to any extent.
Q. Not to any extent?
A. No, sir; I have looked at a few titles—that is, to examine the mere record of a few titles. I have sometimes, if an abstract was given me, looked over the abstract, and would make a few pencil notes on the abstract.
Q. What makes you say you have not to any extent?
A. I still say that. I say I have in a few cases.
Q. How many abstracts of title have you looked over and examined for yourself?
A. I have not examined any.

Q. Didn't you examine this abstract in question?

A. No; Mr. Horn did. Do you mean to ask whether I examined this title for myself?

Q. Did you examine this abstract in this case?

A. Yes.

Q. And didn't you hand to Mr. Chittendon, in your own handwriting, about a dozen objections to this title?

A. I handed Mr. Chittendon no objections.

Q. Did you hear the testimony of Mr. Chittendon that you handed him over a dozen objections in your own handwriting?

A. Mr. Chittendon did not so testify.

Q. Did you make up a list of objections to this title at all?

280 A. I made minutes of what the records revealed as to the instruments referred to in the abstract, on examination of the records of these instruments, and of what suggested themselves to my mind on looking at the abstract.

Q. Read the question. (Question read by the notary.)

A. I don't understand the question, except as I have answered.

Q. Did you note down on paper at all reasons why you objected to the title?

A. I may have.

Q. Can't you answer that question without making a speech? It is a very simple question.

A. Let me alone, please.

Q. You are a witness, and it is your duty to answer my question.

A. I am answering it.

Q. If I had you in the court before the judge and jury all I would ask would be to have your conduct there what it is here.

A. There is no use in your lecturing me. Ask me a question and I will answer.

(Question read by the notary.)

A. I made no objection to the title, except those made by Mr. Horn.

Q. You didn't make objections to the title at all excepting the objections pointed out by Mr. Horn?

—. ——.

Q. Did you write down on paper in what the title to this land was defective?

A. I wrote down on paper minutes of what the records revealed, and also what struck me in looking over the abstract.

Q. And the defects in the title?.

A. I didn't know whether they were defects in the title or not, simply as they appeared to me for Mr. Horn to pass on in connection with the abstract. He didn't make any examination of the record. I made the examination of the record and reported to him in minutes what the record revealed. He examined the title and reported to Mr. Chittendon.

281 Q. Was that writing you made up handed by anybody to Mr. Chittendon, that you know of?

A. I think it was given to Mr. Chittendon.

Q. Did Mr. Chittendon tell you the objections made didn't amount to anything?

A. I don't recall any such statement by Mr. Chittendon.

Q. Will you swear he did or did not?

A. My recollection is that Mr. Chittendon made no such statement to me.

Q. Didn't Mr. Chittendon tell you that he had evidence that this mortgage, that the Sanborn claim had been paid?

A. He did not.

Q. He did not?

A. He did not.

Q. You state, I think, in one of your pleadings here that you are not a resident of the United States?

Objected to as immaterial and irrelevant.

A. I did not make any such statement.

Q. In one of your pleadings have you not put it in writing that you deny being a citizen of Dubuque, Ia.; that you are a citizen of Great Britain?

Objected to as immaterial.

Q. Are you a citizen of the United States?

A. Your statement was that I denied being a resident. I did not deny being a resident, but I did deny being a citizen.

Q. Of what country are you a citizen?

Objected to as immaterial.

(See notary's certif. for amendment to ans.—A. W. C., notary.)

282 A. I stated, I think, in the pleadings that I was a citizen of Great Britain and Ireland.

Q. How long have you lived in this country?

Objected to as immaterial.

A. I came to this country in 1852 or '8, I think, and have been absent from the country a portion of the time since.

Q. Did you renew your tender of money after the deed arrived?

A. I don't know when the deed arrived. I made formal tender on the 27th day of June, 1882.

Q. Did not Mr. Chittendon tell you at that time the deed had not come yet?

A. He did.

Q. Didn't you know the deed came afterwards?

A. I did not.

—. Will you swear you did not know from Mr. Bacon or Mr. Chittendon or any source that the deed did come to Mr. Chittendon's office?

A. That is another question. I understood from Mr. Bacon, I think, not from Mr. Chittendon, that the deed had come, but I had no knowledge of it other than that.

Q. If you was informed that the deed had come did you renew

your tender of money—full tender—at any time? Did you go, after you was informed the deed had come, and offer to pay Mr. Chittendon the amount due in payment of the contract and ask for your deed?

A. I repeatedly stated to Mr. Bacon——

Q. Answer that question just as I ask you.

A. Mr. Bacon and Mr. Chittendon, on the occasion of my interview with them on the street, knew that I was willing at any time and ready to fulfill my obligations under these two contracts.

Q. I repeat the question. (Question read by notary.)

A. I offered repeatedly——

Q. I want an answer to that question whenever you get at it so you think you can.

A. I say that I repeatedly offered to fulfill my engage-
283 ments—obligations—under the contract, though I made no formal tender save the one to Mr. Chittendon—the tender of money to which I have testified, I think. That is the only answer I have te make.

(Question repeated.)

A. I never went to see Mr. Chittendon after the 27th of June, 1882.

Q. Why don't you answer the question? The question is whether, after you was informed the deed had come, you went to Mr. Chittendon and made tender of the money and demanded the deed?

A. I did not, sir.

Q. After getting the abstract and after you was informed by Mr. Horn of the outstanding clouds on the title—that mortgage that Sanborn had; that power of attorney that was lacking of record—from that time on you objected to paying that money on that contract until the title was perfected of record, did you not?

A. I think not. I did not. I will say that—until it "was perfected of record."

—. Well, until it was cleared to your satisfaction.

A. No; I didn't. I referred them to Mr. Horn to settle the title with him to his satisfaction.

Q. Didn't Mr. Bacon go to you repeatedly to get you to go and pay your money and get your deed?

A. Mr. Bacon came to me repeatedly, but for the most part to try and get me to surrender the contract.

Q. repeated.

A. He did not.

Q. You swear positively that Mr. Bacon did not go to you repeatedly to get you to pay the money and take up the deed?

A. I do.

Q. Didn't Mr. Chittendon at any time express a desire to you that you would go and straighten up that matter and take your deed?

A. No.

284 Q. He never did?

A. No.

Q. Mr. Bacon and Mr. Chittendon during all the three years, from the time you took the contract up to the time you settled with Rogers,

never, either one of them, asked you to come in and pay the money and take your deed? Do you swear that?

A. I swear that Mr. Chittendon never asked me to go in and pay the money and take the deed. Mr. Bacon never asked me to pay the money and take the deed, but he asked me to go and see Mr. Chittendon and talk over the defects of the title.

Q. Why did you go and pay the money and take the deed?

A. For the reason that I was never told to take the deed; it never was presented, and I never knew they were in position to make the title to the property.

Q. You swear you did not know the deed had come?

A. I swear I did not know, but that I heard the deed had come.

Q. When you heard the deed had come, why didn't you go and pay the money and take it?

A. For the reason that I heard the title was not good—that they were still engaged in clearing it.

Q. Did you make any efforts yourself to see whether these defects that appeared on the abstract had any foundation to them or not?

A. I didn't know anything about that.

Q. Read the question. (Question read by the notary.)

A. I made inquiries of Mr. Bacon regarding it, but never could find satisfaction in reference to it.

Q. Did you make any other efforts to find out whether those apparent defects on the record amounted to anything or not?

A. I think I made a written demand at one time on Mr. Chittendon in regard to them.

Q. What was your demand on Mr. Chittendon?

285 A. That they appear, and what, if any, evidence they had of materiality or otherwise of the instrument; that I was ready to take the title whenever they were prepared to convey. I think I wrote them one letter.

Q. What was the answer?

A. I don't remember that I got any.

Q. Did you go to the office to see about it?

A. I did not.

Q. Did you make any other efforts to find out the actual condition of the title to said land?

A. I don't recall any.

Q. Did you go to Sanborn to see in regard to that claim on the land?

A. I did not.

Q. Never?

A. My recollection is not.

Q. Did you go to see whether Rogers paid a thousand dollars for their interest in the land?

A. I did not.

Q. Did you or any one for you take any other steps at all to satisfy yourself in regard to the title to the land?

A. I hardly know what the question means. I hardly know how to answer it.

(Question repeated.)

A. I took no steps in regard to it that I remember, nor did I know how to take any steps. I did not know any of the parties.

Q. Did you ever in your life make perfect the record to a title to land?

A. I never did.

Q. Never got mortgages satisfied of record?

A. I never did.

Q. Never got deeds and put them on record because they hadn't been put on record?

A. No, sir. That has been done by parties for whom they were obtained, those I bought of.

Q. Never got judgment or satisfaction of any kind?

A. No.

Q. In all the 15 or 20 years' experience you tell about in
286 dealing in real estate, buying and selling, never in a single instance got a paper, a deed put on record, so it would be all straight of record?

A. I don't recall any instance now. Papers were procured for me and title straightened by other parties.

Q. You have had other parties do it for you?

A. It would be done for the other side.

Q. Once in awhile you occasionally sold a piece of land for yourself in all these 20 years?

A. I don't remember that I have had any trouble in conveying titles. If I had, it was done by the agent making the sale.

Q. The records, so far as this piece of land was concerned, were just as much open to you as to Mr. Rogers?

A. Yes, sir.

Q. You had the same facilities for looking up this piece of land that he had?

A. I don't think I had, sir.

Q. Wherein did he have any more facilities than you?

A. I don't know. I suppose he had scores of information that I had not.

Q. I don't want what you suppose. I ask you if you know. You say you think he had a better chance to look up the title than you. What is your basis for thinking so?

A. It is his business. He understands it. He is an attorney and I am not.

Q. Can you not hire a lawyer?

A. I can.

Q. Didn't you hire Mr. Horn?

A. I did.

Q. Then how had he any chance over you? You had hired an attorney to act for you.

A. Mr. Horn acted for me in examination of the title; that was all.

Q. Was there anything to hinder your employing him to look it up just as thoroughly as Mr. Rogers looked it up?

A. Nothing except expense. I didn't want to go to the expense.

Q. You knew Mr. Sanborn lived right here in the city?

287 A. I did.

Q. And you never went to them to take pains to ask them about their claim to that land?

A. I did not go and ask Mr. Sanborn about it.

Q. When did you first hear of their interest or claim in the land?

A. I believe I got the first knowledge from——

Q. Read the question. (Question read by the notary.)

A. The summer of 1882.

Q. And then this matter lay along all that time—three years—and you were living right here in the city, were you not?

A. No, sir.

Q. Where did you live?

A. I was here a portion of the time and away a portion of the time.

Q. Where did you live?

A. My home was in Dubuque, Ia.

Q. How much of those three years did you stay in St. Paul?

A. About half the time.

Q. During those three years you were half the time right here in St. Paul, and made no effort to learn from Mr. Sanborn what that interest was in the land?

A. I did not. I understood, however, that they claimed that mortgage.

Q. You have spoken in your testimony of having talked with Mr. Bacon in front of the German-American Bank building?

A. Yes.

Q. Hadn't you called him some vulgar, obscene names just previous to his striking you?

A. No, sir.

Q. Hadn't you talked to him in an ungentlemanly manner just before he struck you?

A. He talked to me in an ungentlemanly manner.

Q. Hadn't you talked to him in an ungentlemanly manner?

A. No, sir; not before he did—simply to retort an abusive phrase used by himself to me.

288 Q. You just swore, if you recollect, that you didn't use any abusive language or ungentlemanly language at all?

A. I didn't say that. I don't wish to be understood as saying that.

Q. I will ask you the question again. Did you, just before he struck you, use ungentlemanly language to him?

A. I used the language he used to me.

Q. I ain't asking you one word about what he said to you, I was asking about what you said to him. That is the question, whether, just before he struck you, you used ungentlemanly language to him. As a gentleman, you can answer it yes or no promptly.

A. I said to Mr. Bacon just before he struck me——

Q. The question is, Did you use ungentlemanly language to him just before he struck you?

Objected to, that the witness should be permitted to state what he said to Mr. Bacon, and let the court judge whether it was gentlemanly under the circumstances. It might be ungentlemanly under some circumstances and others it might not, and it is not fair to put the question in that form. The witness should be permitted to state what he did say.

Q. The question is, Just before he struck you did you use ungentlemanly language to him?

A. I will state what I did say and let the court judge whether my language was ungentlemanly or not.

Q. That isn't the question. The question is if you used ungentlemanly language just before he struck you?

Mr. McCARTEY: State whether, under the circumstances, you considered it ungentlemanly to say what you did.

A. I did not. I wish to state what I did say and let the court judge whether it was ungentlemanly or not.

Q. I am here to ask you questions, not to have you put questions in my mouth. Do you know what ungentlemanly language is from one gentleman to another?

A. Perhaps I do and perhaps I don't.

Q. I ask you now again, Just before he struck you did
289 you use ungentlemanly language to him?

A. I will state what I said to him just before he struck me.

Q. You refuse to answer my question, do you?

A. I refuse to answer nothing, but I insist upon answering as I understand things myself.

Q. Had you passed hard words backwards and forwards just before he struck you?

A. Yes, sir.

Q. You to him and he to you?

A. Yes, sir; in reverse order.

Q. Was the language you used ungentlemanly?

A. Before he struck me, no. I simply refused to retract.

Q. The language you used to him before he struck you was not ungentlemanly?

A. I think not—that is, I wish to state what it was, and you can judge for yourself.

Q. We have got your statement now that the language you used was not ungentlemanly.

A. I will give the language if you want it.

Q. I will ask you this further question: Did not Mr. Bacon at that very time accuse you of refusing to do anything — that you wouldn't pay and take your deed, and you wouldn't give up your contract—you would do neither the one thing nor the other? Didn't he charge you with being in that position?

A. My recollection is he did not.

Q. Now, how long were these negotiations pending between you and Mr. Rogers before you came to the settlement you made?

A. I don't know what is the meaning of your question—what

you mean by the term "negotiations." I made no proposition of any kind to Mr. Rogers, as far as I remember, until the 18th day of March, 1886.

Q. You swear that you don't know what the term negotiations means?

A. In that question.

290 Q. When did you and Mr. Rogers first begin to talk about his claiming the land and you claiming the land?

A. That was about December, 1885.

Q. Didn't you and he carry on negotiations for the purpose of settlement of your interests in that land from that time to the time he made the settlement?

A. Again I don't understand the term negotiations. There were conversations in regard to it between us; none that I remember except the one I have testified to about the thousand dollars. I think that was in writing.

Q. Didn't he offer to pay you what it would cost to get rid by suit on your title to the premises?

A. Yes; I think he did.

Q. That was the first proposition?

A. There was some such proposition.

Q. The next proposition was to give you a thousand dollars—that is, the second proposition?

A. Yes; I think he made that.

Q. Now, these propositions—I don't care whether they were from him or from you—extended over this period from Dec., 1885, to March, 1886?

A. They did not. One of them—the first you speak of—was rejected the moment it was made.

Q. Between that proposition and the last proposition was from Dec. to March, was it not?

A. From the first proposition to the settlement was from Dec. to March; yes.

Q. From the first proposition to the last proposition was from Dec. to March, 1886?

A. Yes.

Q. During all that time you and Mr. Rogers were considering how you could agree together on some terms of settlement, were you not?

A. I was not. I was considering nothing at all, except that Mr. Rogers was urging me for propositions which I declined to make. So far as one side was concerned there was no proposition about it. If a proposition had come to me that was a proper one I might have entertained it.

291 Q. You understood that Mr. Rogers claimed the title to that land from December, 1885?

A. Yes; from about Dec., 1885.

Q. And from Dec., 1885, up to March, 1886, you had been examining the claim?

A. Yes; I did.

Q. Did you make any efforts at all or employ any attorney or anything to look up this right to that land?

A. I did not.

Q. You wouldn't have made that settlement had you understood it?

A. I would not.

Q. Put your finger on one fact that Mr. Chittendon testified to, that if you had known you would not have made that settlement.

A. There was quite a number of facts. Mr. Bacon's connection with the transfer to Rogers was one.

Q. What was Mr. Bacon's connection with the transfer to Rogers?

A. Mr. Chittendon's testimony would show.

Q. I ask you.

A. Mr. Chittendon stated, if I remember, that the transfer was procured through Mr. Bacon's arrangement and interference.

Q. What conveyance was made by Bacon to Rogers?

A. None. Mr. Bacon procured the conveyance from Geo. N. Chittendon to Edward G. Rogers.

Q. I am unable to understand your saying that if you had known that Mr. Bacon had anything to do with the helping Mr. Rogers to get title to this land you would not have had anything to do with the settlement with Mr. Rogers.

A. I didn't say that, quite.

Q. The question I ask you now is, If you had known that Mr. Bacon had anything to do with the helping Rogers get this title you would not have made this settlement with Mr. Rogers?

A. It is a fact.

Q. That you wouldn't have settled with Mr. Rogers if you had known of Bacon having anything to do with it?

A. No, sir; I would not, because if I had known that fact I would have considered it as evidence of a collusion between them.

292 Q. Do you know that there is any collusion between them now in regard to getting the title to that land?

A. I believe it.

Q. What do you know about it? Name any one fact that you know of that makes you believe there is a collusion between Mr. Rogers and Mr. Bacon in that land and hang together.

A. I have no personal knowledge, but I know from the testimony.

Q. What testimony?

A. Mr. Chittendon's

Q. Mr. Chittendon didn't say *the* Bacon bought any interest in it.

A. You have not asked me that question. You have asked me as to collusion. I say all the circumstances of Mr. Chittendon's testimony go to show collusion.

Q. To your mind?

A. Yes; to my mind.

Q. You stated to Mr. Rogers that he hadn't any title to the land, didn't you?

A. I understood from Mr. Rogers that he had a title separate from

that through Chittendon deed. I didn't know what title he had or believe in his title under these claims.

Q. You stated to Mr. Rogers that he had no title to these lands, didn't you—that it was a cloud upon your title?

A. The Chittendon deed?

Q. Yes.

A. Yes, sir.

Q. And you insisted he hadn't any title to that land; that the title belonged to you?

A. I said that the equitable title belonged to me.

Q. He said that he had a title to the land, and that your contract was a cloud upon it?

A. Yes, sir.

Q. And that went on from Dec. to March, he insisting that he had a title to the land, and that your contract was a cloud upon the title, and you insisting that you had title and his claim was a cloud upon it. Is not that the condition of the mattter from Dec., 1885, to the 17th of March, 1886?

293 A. It is not, but I want to make statement for myself.

Q. Were you ever in court before?

A. I was.

Q. Been a witness before?

A. I have.

Q. Do you know the difference between direct and cross examination?

A. I have something of an idea.

Q. Don't you know that on cross-examination it is your duty to answer all the questions and stop, and when you get through your counsel will bring out what you have to tell and give you a whole week to talk if you want. Now, it was for the purpose of settling your differences between you and Mr. Rogers in regard to this land that you got together to talk about it and make a settlement, was it not?

A. It was.

Q. Did you draw or cause to be drawn a writing setting forth your settlement and all about it and what it was?

A. I did not draw any writing.

Q. Did you cause it to be drawn?

A. I did not cause one to be drawn.

Q. Was there one drawn?

A. There was.

Q. Who drew it?

A. Edward G. Rogers.

Q. Did you read it before you signed it?

A. I think he read it.

Q. Did you read it?

A. I don't recall that I did. I think he read it.

Q. Do you swear you did or did not?

A. I don't swear I did not.

—. You won't swear you did or did not?

A. My recollection is Mr. Rogers——

Q. I am not asking you whether Mr. Rogers read it, but yourself. I have asked you four times.

A. I said that I didn't recall that I read it.

Q. You knew the contents of that writing, did you not, when you signed it?

A. I did.

Q. Where was that writing left?

A. It was left with John D. O'Brien.

294 Q. It was to remain there, was it not, in his office, until the deeds were passed, executed and passed, and the money passed?

A. Yes, sir.

Q. And after that was it to be passed over to Mr. Bacon?

A. No, sir.

Q. Wasn't that the distinct understanding between John O'Brien and Edward G. Rogers and yourself?

A. No, sir; as I recollect, there was no such understanding at any time.

Q. You came around to Mr. Rogers after *that* signing that writing and you asked him to let you take it and draw it more fully, did you not?

A. I don't know that I went to Mr. Rogers. I remember seeing Mr. Rogers, and I think he gave me a written order for it on John O'Brien.

Q. You went to Mr. Rogers and asked him to let you take that settlement and draw it up more fully, did you not?

A. I don't remember that I did, I say. My recollection is that I sent to Mr. Rogers and he sent me the order for it, for the purpose you stated.

Q. Did you go to Mr. O'Brien and get the written settlement?

A. I think I sent for it.

Q. Did you receive it?

A. I did.

Q. Did you have it in your hands?

A. I did.

Q. What did you do with it?

A. I put it, I believe, in my valise or satchel. That is as near as I can recall.

Q. What have you done with it?

A. I have not the remotest idea.

Q. Will you procure it?

A. I cannot.

Q. Why can you not?

A. Because I don't know where it is.

Q. Has it not been handled by you since you took it from Mr. O'Brien's office?

A. Not to my knowledge.

Q. You don't know what you have done with it?

A. I don't know what I have done with it.

Q. Can you repeat the contents of it?

A. I cannot.

295 Q. Try and repeat the contents of it as far as you can.

A. It is impossible for me to word it, but I can give something of the substance.

Q. I want you to repeat all there was in it, as near as you can recollect. I want you to go slow, and you can give five minutes between the words if you want to.

A. I am unable to state the words of the contract. I will give as well as I am able the words or contents of the instrument. It began with a preamble, "Whereas" (I came, I think, there) "David J. Hennessey" (I don't know whether my name was before Mr. Rogers', but I think so) "claims title to," &c. (Here followed the description of lands), and "whereas" Edward G. Rogers claims title (I don't know if description was repeated or not), but whereas each of us claimed title to the lands in controversy in this suit (that is, to the whole lands). Whereas I claim title to it and whereas he claimed title to them, now, therefore (or something like that), to settle the differences of the parties, it was agreed that he would give me a quitclaim deed to an undivided half interest in the land, and that I would give him a quitclaim deed to an undivided one-half interest in the lands and pay him $2,750 in money. There was, in addition to that, I think, a clause by which I released Geo. N. Chittendon and Geo. V. Bacon from claims. I don't know whether it was stated under these contracts or not. There was some clause by which I made release to Geo. N. Chittendon & Geo. V. Bacon. That is my recollection of the contents.

Q. The substance of the contract was, then, as you recollect, that that written contract settled all the differences between you and Mr. Rogers in regard to that land; that was one thing, was it not?

A. Yes, sir.

Q. You were to have half of the land and he was to have half?

A. Yes, sir.

Q. You to pay him $2,750?

A. Yes, sir.

296 Q. That was just about half what he paid?

A. I think he claimed to have paid more.

Q. About half what he had paid?

A. Yes, sir.

Q. And you also, in consideration of the rights and covenants, released all claims against Geo. N. Chittendon & Geo. V. Bacon on account of that land?

A. I don't remember that that was the way in which the contract read, that in consideration of anything in that that I released, but it contained a release clause.

Q. Didn't you understand why that clause was put in there?

A. I did not.

Q. Didn't you understand that Mr. Rogers had to give bond?

A. I never heard of Rogers' bond until long afterwards.

Q. Rogers insisted on that release to Geo. N. Chittendon & Geo. V. Bacon being in as part of the stipulation?

A. It was not talked of before Mr. Rogers, but before signing he insisted that clause should go in.

Q. The idea was to settle the whole business between you and Geo. N. Chittendon & Geo. V. Bacon?

A. That was the understanding.

Q. Now, I will call your attention to another matter right there: In that stipulation was the amount specified $2,850 instead of $2,750, and didn't you make Rogers allow you $100 on that for the Bacon purchase, which made $2,750 you handed him?

A. No, sir.

Q. That was not the way it was figured?

A. No, sir; I am positive about that.

Q. When you and Mr. Rogers settled up was it not entered and the figures named in the entry?

—. I am not certain, and Mr. Rogers is not here now, but my impression is it was entered in his books right at the time when you settled, that the $100 was allowed to you.

—. Will you swear that the $100 was not mentioned and allowed you in that deal with Rogers?

A. The $100 was mentioned, but it was not a part of that settlement.

297 Q. Was it allowed you in any way, shape, or manner?

A. It was not.

Q. At no time?

A. At no time. My proposition was this, in T. F. Martin's office——

Q. I am not asking you that.

A. My proposition was $2,750.

Q. You swear positively it was not $2,850, and that hundred dollars allowed you?

A. I swear positively that my stipulation——

Q. I ask you if you swear positively it was not $2,850 and the hundred dollars allowed you.

A. $2,750 was my settlement at that time.

Q. The $2,750 was what you paid?

A. It was what I paid and what I stipulated to pay and the only thing I was bound to pay.

Q. Have you not been allowed that $100 in any settlement between you and Rogers at any time?

A. I was allowed in the settlement with Rogers—I will tell you precisely what I said if you wish to hear me.

Q. I don't wish to hear you. I will be frank with you. I wasn't paid to sit down and listen to your barking.

A. You are here to get at the truth.

Q. I am getting at the truth. You swear positively you never was allowed $100 under any circumstances.

A. I swear positively, over and over again, I was allowed in the settlement with Rogers $2,750. Now, as I say, if you wish me to go further I can make another statement.

Q. Don't you think if I did I could ask you?

A. All right, sir.

Q. Did you swear here to-day you didn't know Bacon had an interest in that land until Aug., 1886?

A. I did and I do.
Q. Do you still so swear?
A. I do.
Q. Do you recollect, shortly after this settlement was made between you and Rogers, that Mr. Rogers commenced an action in court here in which Mr. Bacon and you and he were parties?
A. I don't recollect anything about it, for the simple rea-
298 son that I had no communications——
Q. I don't care anything about your reasons. I ask you if you recollect that fact.
A. I knew there was to be an action. No; I didn't know there was to be such a one. I knew Mr. Rogers was to bring suit to remove some cloud, as he claimed, on the title. He had mentioned that at our settlement, but he made no mention of any action to be begun with that title.
Q. Part of the parol contract—the settlement that didn't enter into writing—was that Mr. Rogers was to immediately bring suit and clear that Sanborn mortgage from the title at his own expense and not charge you any attorney's fee?
A. It was not. Mr. Rogers was on the eve of leaving for California. He was to bring suit, but not immediately. He was about to meet his wife at Kansas City, I think he said, and they were to go to California. On his return he expected to bring a suit, as he gave me to understand, and he asked my consent to have my name joined in it.
Q. Was the object of the parol talk (which did not enter into the contract) that Mr. Rogers was to bring suit and set aside and discharge of record the Sanborn mortgage at his own expense and not charge you attorney's fees?
A. No.
Q. Didn't he, after he got back from California, along in May or June, come to you and tell you Mr. Bacon had a quarter interest in that land, and that in bringing the action he agreed to bring it was necessary to join Mr. Bacon, and that he wanted you to understand and know that?
A. He did not.
Q. Did he go on and bring action and wipe out that cloud that was on that title?
A. I was informed that he did.
Q. Do you know whether he did or not?
A. Personally I do not.
Q. Did you ever look up the records to see if he did?
A. I never did.
299 Q. He agreed to bring action and clear up some cloud?
A. Yes.
Q. You were informed that he brought action and did what he agreed to do?
A. Yes, sir.
Q. Did Mr. Rogers ever say to you that he knew personally of his own knowledge that the Sanborn mortgage was a valid, subsisting claim?

A. Mr. Rogers stated——

(Question repeated,)

A. He did in substance.

Q. That is a very plain question.

A. Precisely.

Q. I will ask you now if you think Mr. Rogers ever told you he knew of his own knowledge that the Sanborn mortgage was a valid and subsisting claim; do you say he said that or not?

A. Mr. Rogers told me——

Q. I would like an answer.

A. Let me answer. You are not the witness; you are the attorney.

Q. You can answer that question yes or no.

A. Let me answer as I please. If you want to be witness you can take the chair.

Q. You are witness, and I am entitled to a direct answer, which you apparently refuse to give.

A. I will tell you what Mr. Rogers said.

Q. I am not asking what Mr. Rogers said.

A. I can't tell you what he didn't say.

Q. You can tell whether he said that or not?

A. I say that he said that substantially, as I understand.

Q. That he knew of his own personal knowledge that to be a valid, subsisting claim?

A. I don't know that he used the words "of his own knowledge," but I say he knew. He claimed to know.

Q. That ain't my question. I ask if he said he knew of his personal knowledge.

A. I say I don't know that he used the words "of his personal" knowledge.

Q. You see just what work I have to get answers to my questions.

A. There will be no work if you will explain your ques-
300 tions.

Q. Didn't you know that be based his knowledge or information from others?

A. I did not.

Q. Didn't you know that he based his knowledge on the assignment from the Sanborns and the records, and that is all he knew about it?

A. I don't know what he knew that I didn't know what he knew.

Q. We don't need to have any misunderstanding about it. He didn't pretend to you that he knew of his personal knowledge whether that was a valid, subsisting claim or not?

A. I don't remember the words "personal knowledge." I do remember his insisting he knew, but that he used the words personal knowledge I don't swear to, because I don't know that he did. I don't recall the words.

Q. Before this, and before you paid the money to him, didn't he give you a whole pile of instruments to record?

A. He gave me several instruments to record.

Q. Before you gave him any money and before he gave you any deed?

A. Yes; it was about that time, I think.

Q. That is a nice answer.

A. If you are witness, it is all right.

Q. Did he give you a quitclaim deed from John B. Sanborn & wife to record?

A. I think he did, judging from the date of the record; otherwise I don't know. I don't recall what the instrument was.

Q. Did he give you that assignment from John B. Sanborn & wife to record?

A. I couldn't identify the paper, because I don't know. I simply judge from the date. I don't remember the papers, what they were.

Q. Well, all these papers he gave you to record before you paid him the money and before he gave you the deed?

301 A. He gave me several papers to record after the execution of the agreement, and they were to be put of record as affecting the title.

Q. Did he state to you at the time you were there in O'Brien's office and made that contract that he could get rid of the Sanborn mortgage easy enough; that he would have no trouble about that?

A. I remember no such statement.

Q. Didn't he tell you at the time that it had been paid, and all that was wanted was to wipe out the cloud?

A. I don't remember any such statement.

Q. Do you remember that he did not make any such statement?

A. I don't remember any such statement.

Q. Do you swear that he did not make any such statements, in substance?

A. I swear I don't remember any such statements. I will swear this, that Mr. Rogers told me there was some small mortgage which required to be removed which he would remove without cost to me, and which I understood to be entirely distinct from the Sanborn mortgage.

Q. Was he to get that mortgage removed by an action?

A. Well, he asked my consent to use my name in the action.

Q. The action he brought will show what mortgage is referred to?

A. I don't know what action it was, but I understood it was entirely distinct from the Sanborn mortgage.

Q. Do you swear he didn't, at that time when his contract was drawn up, that he didn't tell you that the Sanborn mortgage could be easily removed; that in his judgment it had been paid, and that all that remained was to have it wiped out as a cloud from the title?

A. He did not.

Q. Do you swear that that contract of settlement was not to be given up to Mr. Bacon for him to hold as a protection?

A. Positively. I swear it was not to be given to Mr.

302 Bacon, delivered to Mr. Bacon or anybody else, but to be kept by John D. O'Brien.

Q. It was to be kept by John D. O'Brien till the money was paid and the deed delivered. After that there was no provision for it?

A. Of course; because it would be settled.

Q. And the only person that the contract would be of any benefit to was Bacon, and it was not to be left with Bacon?

A. No, sir; positively it was not.

Q. It was not to be left with Bacon?

A. No, sir; no such mention made. I wanted it put on record, and Rogers at first said yes, and then on second thought said, No; leave it with John O'Brien for the protection of both parties. It was left in John O'Brien's office, and I got a written order to get it from there.

DAVID J. HENNESSEY.

Adjournment was here had till 10 o'clock Oct. 13, at which time parties met.

Counsel for defendant introduced the following documentary evidence:

303 United States patent to Timothy R. Creassy. Filed for record March 22, 1886. Another U. S. patent to Timothy R. Creassy. Filed for record March 22, 1886. Another U. S. patent to Timothy R. Creassy. Filed for record March 22, 1886. Another U. S. patent to Timothy R. Creassy. Filed for record March 22, 1886. Marked, respectively, Exhibits "A," "B," "C," and "D."

Also quitclaim deed from John B. Sanborn & wife to Edward G. Rogers. Filed for record March 22, 1886. Assignment of mortgage, filed for record March 22, 1886, John B. Sanborn & wife to Edw'd G. Rogers. Marked, respectively, Exhibits "E" and "F."

Defendant's counsel calls upon plaintiff's counsel to produce the papers that were delivered by Mr. Chittendon to Mr. Rogers at the time of the transfer of the title to Mr. Rogers by Geo. N. Chittendon.

Among others delivered to Mr. Rogers were certain letters and documents containing information of evidences showing payment of the so-called Sanborn mortgage, a mortgage held by Sanborn; and we wish to have all the papers that were delivered to Mr. Rogers by E. T. Chittendon in any way referring to this title to be produced that we may put them in evidence, if they are material.

Plaintiff's counsel replies that they will produce them, if they have any, without subpœna, and that Mr. Rogers is absent and they cannot be produced to-day.

Adjournment was then taken till Saturday, Oct. 15, 10 o'clock a. m.

304 SATURDAY, *October* 10, 1887—10 o'clock a. m.

Parties met, pursuant to adjournment, but no testimony was introduced, and adjournment was taken till 2 o'clock p. m., at which time parties met, Mr. Lawler appearing as attorney for defendant.

The following documentary evidence was introduced:

1st. Assignment of mortgage and quitclaim deed acknowledged Sept. 30, 1885, the parties being John B. Sanborn and Rachael R., his wife, parties of the first part, and Edward G. Rogers, party of the second part.

It is stipulated that the deed described will be considered in evidence.

JOHN B. SANBORN, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination by Mr. LAWLER:

Q. You are an attorney-at-law by profession, are you?
A. I am.
Q. How long have you resided in St. Paul?
A. Thirty three years Dec. next.
Q. Have you practiced your profession here that length of time?
A. Yes, sir; with the exception of six or seven years, when I was engaged in public service.
Q. You are acquainted with Edward G. Rogers?
305 A. I am.
Q. And with Geo. D. Bacon?
A. Yes, sir.
Q. And you have known them how long?
A. For twenty years, Mr. Rogers, and Mr. Bacon from six to ten; I don't know exactly, but some years.
Q. Do you recollect the assignment of mortgage and quitclaim just described?
A. I do.
Q. You are the John B. Sanborn mentioned in that assignment of mortgage as a party of the first part (with Rachael, his wife) in the quitclaim deed?
A. Yes, sir.
Q. Please state the circumstances under which those deeds were given by you to Rogers and the circumstances which led up to that transaction.
A. The mortgage and whatever title remained of record in Niel D. Shaw was vested in me at the suggestion or upon the action of the firm, John B. and Walter H. Sanborn, and the business was conducted, so far as those interests were concerned, by Walter H. Sanborn. Some time—I should say a year or more after those interests were vested in me—Bacon stopped me in the street and stated that he wanted those interests, or that he wanted to sell his interest, and that it was very important to him that the title should be made perfect of record, as he was opening negotiations for the sale of the property, as he stated. He made me an offer for the interests that were in me, but I don't remember precisely what it was. My best recollection is $400 or $500. Whatever the offer was, I communicated it to Walter H. Sanborn. He had the management of this matter from the start, and he decided that the offer was not as much as should be made for the interests. He thought it should be worth more to have that cloud removed. I think Mr. Bacon spoke to me once more between that time and the time Rogers spoke to me, which was, I should say, within 30 days before the date at which the assignment or conveyance was made for myself and

wife to Rogers; I think as much as a year before Rogers
306 spoke to me. Mr. Rogers opened the conversation by language which indicated to me that it was some negotiation which had been carried on by Bacon. I cannot give precisely his words, but he certainly used Bacon's name and said the matter must be brought to a head in some way, either by negotiation or litigation, and if they could not obtain it at a fair price he must commence suit. I stated that to Mr. Walter H. Sanborn, I think the same day Mr. Rogers spoke to me. I don't remember that I heard anything more about it till one day, coming into the office, Walter Sanborn said to me, "Rogers will give $1,000 for your interest and have the title straightened out," to the extent that a deed from myself and wife would straighten it, and he asked what I thought about it. It was finally closed out on that basis, and the deed was thereupon executed by myself and wife, and I delivered it to Rogers, and Rogers gave me his check for $1,000.

Q. Do you remember who were present when the deed was executed and delivered and the deal finally consummated?

A. I don't remember who was present at that time. The deed was made as our deeds usually are in our office and signed by me and taken to the house by a notary and signed by my wife and brought back. My recollection is that I was there alone or perhaps the clerk might be sitting at his desk. Mr. Rogers came in and gave me the check and I handed him the deed, and that is all my recollection of it.

Q. Do you recollect Mr. Bacon coming in with Mr. Rogers at any time?

A. No; I can't recollect Bacon coming in after Rogers commenced his deal. It isn't at all certain that he didn't, because I don't recollect. I only recollect the main features of the negotiations and the consummation of the negotiations by conveyance and payment. It is more likely that if Bacon came in he came in with Rogers at the
307 time they were negotiating with Walter H. Sanborn, as the matter, I think, was all conducted by him in his office. I know he communicated to me. I remember this distinctly. Walter Sanborn communicated to me that Rogers had offered to pay, and the offer had been made one morning before I came down to the office, and he asked me what I thought about it. So I don't know about Bacon. They might have been together and closed this negotiation. I wouldn't have known it if they had been.

Q. So far as you recollect the case, they were associated in some way in the closing of it?

A. They were associated—that is, they had both been operating in working this out. They left inferences in my mind as to what the relation was, but I don't remember that they ever said, either one of them, what interest he had or claimed to have in the property. Being a real-estate man and an attorney, of course the inference was that the lawyer was performing the work of his profession and the real-estate dealer was straightening up the title, but there was nothing to base it upon but the mere occupation of the parties. I don't remember a word that was said.

Cross-examination by Judge LUSK:

Q. You don't know, do you, but that Mr. Rogers was buying this land for himself just as the deed purports on its face and just as he gave you his individual check?

A. No.

Q. You don't know anything about it contrary to the check and the deed?

A. I do not; no. I mean by personal knowledge, of course, my own knowledge.

Q. The inference that you draw that Bacon had some interest was because Mr. Rogers was a lawyer, was it?

A. Yes; and he (Bacon) was a real-estate dealer. I don't know, as I have stated, except it left that impression that it was a lawyer and a real-estate man.

Q. So far as your own personal knowledge goes, the deed was to Mr. Rogers and went to him—the money was paid by him
308 and it was a personal matter?

A. Yes; it was his check. That was paid to me.

JOHN B. SANBORN.

The following deeds are considered in evidence, the originals being now in the possession of the plaintiff Rogers, and it being stipulated that the originals will be produced in court on the trial of this case, or the defendant may use certified copies as evidence in this case:

1st. Warranty deed, dated Sept. 23, 1885, from Geo. N. Chittendon and Elizabeth, his wife, to Edward G. Rogers, the consideration being $4,600.

2nd. A quitclaim deed, dated March 18, 1886, from Edward G. Rogers and Mary M., his wife, to David J. Hennessey, the consideration being $2,750.

3rd. A quitclaim deed, dated March 18, 1886, from Edward G. Rogers and Mary M., his wife, to Geo. V. Bacon, the consideration being $100.

4th. Warranty deed, dated Aug. 27, 1886, from Edward G. Rogers and Mary M., his wife, to Geo. V. Bacon, the consideration being $10,000.

5th. Quitclaim deed, dated Nov. 22, 1866, from Geo. V. Bacon and Charrie A., his wife, to Edward G. Rogers, the consideration being $10,000.

6th. Notice of *lis pendens* filed in this action, in Washington county, dated Aug. 1st, 1866.

No further evidence being introduced by defendant, adjournment was taken until such time as the parties should agree upon for taking testimony on behalf of the plaintiffs.

309 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known that I took the annexed depositions pursuant to the stipulation on file; that I was then and there a notary public for

the county of Ramsey and State of Minnesota; that I exercised the power of that office in taking such depositions; that by virtue thereof I was then and there authorized to administer an oath; that each witness before testifying was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed stipulation; that the testimony of each witness was carefully read over by him in my presence before he signed the same; that the examination was conducted on behalf of the pl'ff by Hon. J. W. Lusk; that the examination on behalf of def't was conducted by H. C. McCartey, Esq., and by D. W. Lawler, Esq.

Before signing his testimony witness Hennessey made the following amendment to his answer to cross-question 83, p. 66—the addition of the words: "That about Feb'y or March I declared my intention to become a citizen of these United States of America and took out my first papers."

Witness my hand and seal this 4th day of Nov., A. D. 1887.

A. W. CUMING,
Notary Public, Ramsey Co., Minn.

(Endorsed:) Filed Nov. 4th, 1887. Oscar B. Hillis, clerk.

310 UNITED STATES OF AMERICA:

CIRCUIT COURT OF THE UNITED STATES, *District of Minnesota,* } *ss:*

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 310 pages, numbered consecutively from 1 to 310, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 28 day of Sept., in the year of our Lord one thousand eight hundred and 88, and of the Independence of the United States the one hundred and 13th year.

U.S. Circuit Court Seal, Dist. of Minnesota.

OSCAR B. HILLIS, *Clerk.*
T. P. RICHARDSON, *Deputy.*

[Endorsed:] United States circuit court, district of Minnesota. Geo. V. Bacon *vs.* David J. Hennessy; David J. Hennessy *vs.* Geo. V. Bacon *et al.* Return to Supreme Court.

Endorsed on cover: Minnesota C. C. U. S. No. 1545. David J. Hennessy, appellant, *vs.* George V. Bacon and Edward G. Rogers. Filed January 18, 1890.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1103.

DAVID J. HENNESSY, APPELLANT,

vs.

GEORGE V. BACON AND EDWARD G. ROGERS,
DEFENDANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

In September, 1886, George V. Bacon began an action in the district court of Washington county, State of Minnesota, against David J. Hennessy, the appellant, for the partition of the real estate in dispute in this action, the said Bacon and the said Hennessy being at that time each the owner, according to the records, of an undivided one-half interest of the lands (Record, p. 2). The defendant Hennessy answered the complaint, denying Bacon's claim and asserting the defendant to be the owner of the entire interest in the

land. The action having been removed to the circuit court of the United States for the district of Minnesota, one Edward G. Rogers was allowed to be joined as complainant in the case with Bacon, and the said complainants filed their amended bill of complaint, claiming to be each the owner of an undivided one-fourth interest in the said property and praying partition of the same (Record, p. 18). The defendant's answer to the amended complaint denies the existence of any interest in the property on the part of the complainants, sets up the conveyances through which the defendant claims, and alleges the record title and claim of the complainants to have been procured by a fraudulent course of conduct which is particularly described in said answer (Record, p. 19). A cross-bill having been filed by Hennessy against Bacon and Rogers putting the title in issue and praying that a certain deed from Hennessy conveying to Rogers an undivided one-half interest in the land be set aside, and the answer to the same disclosing the same issues as those which arise under the original pleadings, the actions were tried together (Record, pp. 25–31).

The facts of the case as developed by the evidence are as follows: On March 27, 1882, George V. Bacon, one of the parties in this action, contracted with one George N. Chittenden to buy for the sum of $4,400 the land in dispute in this controversy on the terms defined by contract on page 11 of the Record. On June 27, 1882, said George V. Bacon assigned this contract to the appellant, David J. Hennessy, and agreed in said assignment to give or procure for the said Hennessy a good and perfect title to the said land, with warranty deed running from the said George N. Chittenden and wife or from George V. Bacon and wife (Record, p. 12). Both of these contracts were duly recorded in August, 1882, in the office of the register of deeds of Washington county, Minnesota. Shortly after the assignment to Hennessy from Bacon, Bacon furnished Hennessy with an abstract showing the record title of the land, and the latter immediately delivered

the same to H. J. Horn, Esq., an attorney of St. Paul, and employed him to examine the title. Mr. Horn shortly reported to Hennessy that two serious defects of title appeared on examination of the abstract and reference to the records. The record title to forty acres of the property which had been conveyed by an attorney-in-fact was defective, for the reason that no power of attorney to the grantor was on record and a certain mortgage did not appear to be satisfied of record (Record, p. 139). The abstract also showed the existence of certain claims by one John B. Sanborn based on the two defects mentioned (Record, p. 140). Mr. Hennessy immediately made objection to the title on account of the two defects which have been mentioned, and his objections were communicated in proper time to Bacon and to one E. S. Chittenden, of St. Paul, the agent and attorney in that city for the owner of the land. George N. Chittenden during all the time up to the commencement of this controversy lived in Plainfield, Will county, Illinois, and was unacquainted with any of the persons involved in the transaction except E. S. Chittenden. Shortly after the assignment from Bacon to Hennessy the value of the land began to increase in a wonderful manner, and in less than four years after the last transfer its fair market value was $30,000. Bacon had hardly disposed of his interest to Hennessy before he realized his mistake. He had sold for $500 an interest which would have netted him a profit of many thousands of dollars had he carried it for a short time longer. The appellant claims in the pleadings and holds that the record demonstrates beyond a doubt that Bacon, instead of using efforts to clear the title in the interest of Hennessy, conspired with one Edward G. Rogers, an intimate friend and business associate of Bacon's, to defraud Mr. Hennessy out of the legitimate profit of his bargain. With this end in view and aided by E. S. Chittenden, Bacon and Rogers, Bacon acting as the moving spirit in the transaction and with a promise from Rogers to be rewarded with a share of

the spoils (Record, pp. 62, 65, 66), procured conveyances to Rogers which enabled him to cloud Hennessy's title. Bacon, E. S. Chittenden, and Rogers having by these conveyances put it in the power of Rogers to use against Hennessy the two flaws in title of which Hennessy had complained, finally in September, 1885, procured George N. Chittenden to deed the property in question to Rogers by deed bearing date September 29, 1885. Mr. Hennessy was kept in complete ignorance of the conspiracy between Bacon and Rogers and of the assistance rendered to them by E. S. Chittenden. Evidence collected by Mr. E. S. Chittenden showing the untenable character of any claim made by reason of the two defects in title which have been referred to was carefully concealed from Mr. Hennessy and as carefully communicated to Bacon and Rogers. Having been armed by Bacon with deeds which Bacon had covenanted to procure for Hennessy, having employed Bacon and E. S. Chittenden as tools to procure from George N. Chittenden the deed which should have been delivered to Hennessy, Rogers in November, 1885, notified Hennessy of the former's claim to the property and proposed an amicable settlement of their respective claims. Hennessy immediately denied the validity of Roger's claim and asserted his own title under George N. Chittenden and Bacon. Then followed threats of long and expensive litigation, and representation by Rogers that he could in any event hold the property under his assignment from Sanborn (Record, pp. 55, 148, 149, 150, 152, 155, 156). Hennessy, being ignorant of the worthlessness of these claims and of the cheats which had been practiced upon him by Bacon, E. S. Chittenden, and Rogers, finally, by a written agreement dated March 18, 1886, agreed to convey to Rogers an undivided one-half interest in the property, Rogers agreeing to convey to Hennessy a similar interest and further considerations appearing in the agreement (Record, p. 122). Immediately on procuring the quitclaim deed just described from Hennessy, Rogers deeded to Bacon, by deed bearing even date

with the agreement described in the preceding sentence, an undivided one-fourth interest in the land, the consideration named in the deed being $100. In August, 1886, Rogers deeded to Bacon by warranty deed his remaining undivided one-fourth interest for the consideration, as expressed, of $10,000. On removal of this suit to the circuit court of the United States and in November, 1886, Bacon deeded back to Rogers an undivided one-fourth interest and Rogers became a party to this action (Record, p. 66). From the decree of the circuit court granting partition and dismissing the cross-bill Hennessy appeals to this Court.

II.

Assignment of Errors.

1. The circuit court erred in decreeing a partition.

2. The circuit court erred in dismissing the cross-bill.

3. The circuit court erred in not setting aside and holding null and void the quitclaim deed from the appellant to Rogers given in pursuance of the agreement of March 18, 1886.

4. The circuit court erred in not holding that the deed from George N. Chittenden to Rogers was in trust for Hennessy.

III.

Brief of Argument.

The first, second, and fourth assignments can be considered together.

1.

The record shows that Hennessy fulfilled all the obligations of the contract and assignment under which he claimed. Tender was duly made and a deed demanded from George N. Chittenden. (See testimony of Hennessy, George N. Chittenden, and E. S. Chittenden, Record, pp. 96, 125, 145.) E. S. Chittenden and George N. Chittenden testify that shortly after this tender a warranty deed running from George N. Chittenden to Bacon was forwarded to E. S. Chittenden (Record, pp. 49, 82). It is admitted that in due time an abstract of the property was delivered to Mr. Hennessy; that the latter employed an attorney to examine the title; that the attorney warned him of the two serious defects which have been described; that Mr. Hennessy believed the defects to be fatal until after he had been fraudulently induced into making the quitclaim deed to Rogers; that immediately on being advised by his attorney he communicated to Bacon and E. S. Chittenden his objections to the title and insisted that they be remedied before closing the bargain (Record, pp. 143, 144, 145). There is no foundation in fact for the claim upon which the respondents base their entire case that Mr. Hennessy raised pointless and frivolous objections to the title. The record shows that, although on the abstract which Mr. Hennessy delivered to Mr. Horn and afterwards to Mr. Chittenden Mr. Hennessy had noted several inaccuracies and objections in addition to the two vital points which have been mentioned, he *insisted* upon only the two material ones, and when questioned by E. S. Chittenden and Bacon, with the evident intention on their part to entrap him into making unreasonable objections, referred them to his attorney, Mr. Horn (Record, pp. 144, 145, 147). Mr. Hennessy's conduct in the entire transaction is that of a careful and honest man, living up to his own agreement and unwilling to permit Bacon to foist upon him a title which an eminent attorney had pronounced bad.

2.

The record shows that the deed from George N. Chittenden to Rogers was procured by a fraudulent conspiracy on the part of Bacon, Rogers, and E. S. Chittenden, in fraud of the contract rights of the appellant and in breach of the fiduciary relation which existed between him and Bacon.

The motive for the conspiracy was the fact that the property had increased in value from $4,400 in March, 1882, to $30,000 in September, 1885. The opportunity was easy. George N. Chittenden, the owner, was seventy years of age, lived in a distant State, had implicit confidence in his agent and attorney, E. S. Chittenden, and was wholly unaware of the real value of the property. Rogers and Bacon were intimate personal and business friends, had already platted one division of St. Paul, and were willing to invest a small amount in a venture which would return an immense profit if successful (Record, p. 61). With this idea in view, E. S. Chittenden and Bacon, from June, 1882, to the fall of 1885, systematically deceived Hennessy, and Bacon repeatedly endeavored to persuade him to surrender his contract (Record, pp. 147, 155, 74). E. S. Chittenden testifies that he had information from statements and letters that the Moore-Cressy mortgage had been satisfied, and that he immediately communicated this information to Bacon (Record, pp. 127, 128, 129, 136). He also testifies that he had proof that the other objection was untenable. George N. Chittenden testifies that the Moore-Cressy mortgage was obtained by him, and that he had been satisfied that it had been paid in fact (Record, p. 82). He also testifies that the original mortgage had come into his possession, and that he had sent it to E. S. Chittenden before he sent to him the deed running to Rogers (Record, pp. 82, 83). The exact nature of the evidence collected by E. S. Chittenden showing the invalidity of the two outstanding claims does not fully appear from

the evidence, E. S. Chittenden having refused to produce correspondence called for by the appellant (claiming his privilege as attorney), although producing readily any correspondence sought by Rogers and Bacon (Record, p. 133). The testimony as to the mortgage shows that the defect of title thereunder shown on the record was merely formal, and that it was immediately removed by action (Record, p. 59). No one who has read the record will deny that the information clearing the title which came into the knowledge and possession of Bacon and E. S. Chittenden was concealed from Hennessy (Record, pp. 136, 137, 105, 112). The entire evidence shows that Bacon cleared the title for Rogers in violation of his covenant with Hennessy. Bacon negotiated with General Sanborn to procure from the latter, in the name of Rogers, the assignment from Sanborn. He made no mention of Hennessy to General Sanborn. He never said to Hennessy that Sanborn could be procured to make an assignment. General Sanborn's testimony shows that Bacon and Rogers were one and the same in the transaction. Bacon paved the way for Rogers and negotiated the assignment (Record, pp. 178, 179). Bacon called Rogers' attention to the land and promised to endeavor to obtain it for Rogers from George N. Chittenden (Record, p. 61). E. S. Chittenden's letter of September 12, 1885 (Record, p. 96), names Bacon as the intending purchaser. E. S. Chittenden admits that before the transfer was finally made to Rogers he (E. S. Chittenden) had several talks with Bacon, arranging the transfer to Rogers; in other words, that Bacon was Rogers' go-between in the matter (Record, pp. 130, 131). It is testified by Hennessy and not denied that Bacon requested Hennessy to surrender his assignment; that he stated to Hennessy that it was the latter's duty to take the title with the defects mentioned or take back his $100 and rescind the contract. Bacon in his own testimony admits that he stated to Hennessy that it was the latter's duty to do this, and he nowhere claims that at any time he attempted to satisfy

Hennessy by anything more than his uncorroborated statements that the title was good and could be cleared of the defects mentioned. (Record, pp. 74, 75.)

We call the attention of the Court to the significant fact that Bacon and Rogers, in their answer to the cross-bill, deny under oath the existence of any conspiracy or collusion between them to obtain the deed from George N. Chittenden to Rogers (Record, p. 33). It was not until the evidence established circumstantially, but conclusively, collusion between Rogers and Bacon in the entire transaction that the defendants in their testimony admitted the truth of the allegation of the appellant's cross-bill. The defendants, Rogers and Bacon, are entitled to but little consideration in a court of equity for the admission of this material fact, solemnly denied in their answer and conceded by them only after the fact had been independently proved by the testimony of E. S. Chittenden, of George N. Chittenden, and of General Sanborn. The testimony which was finally extorted from Bacon and Rogers gives the exact basis of the corrupt bargain which was entered into between them. They admit that it was agreed between them that Bacon, for his assistance in putting the title in Rogers, should receive one-half of whatever interest Rogers might obtain, and in addition thereto a certain commission to be paid in cash. Foreseeing a legal contest with Hennessy, it was agreed between them that Bacon should bear one-half the expense of the litigation (Record, pp. 65, 66). Mr. Rogers testifies that, in addition to conveying to Bacon an undivided one-half interest in the property, he paid him the difference between $4,705.87 and $5,000 "as a sort of commission" (Record, p. 66). Here we have the spectacle of a practicing attorney, thoroughly conversant with the obligations under which Bacon rested by reasons of his covenants with Hennessy, agreeing to secure legal title to valuable property in defiance and disregard of rights of which he had actual and constructive notice. These two men,

aided and abetted by E. S. Chittenden, the trusted agent and attorney of the owner of the property, secured from George N. Chittenden, an aged and unsophisticated man in a distant State, ignorant of the value of the property, for $4,705.87 a deed to land worth $30,000. The statement made by E. S. Chittenden in his letter of September 12, 1885, to George N. Chittenden (Record, p. 96) that the land had increased in value, "how much he could not ascertain without inquiry," the great anxiety which the writer shows that the proposition be immediately accepted by suggesting the use of the telegraph, the studious concealment of Rogers' name when the writer knew that he was the real party in interest, are sufficient to show to the Court the fraudulent nature of the entire transaction and the character of the men who consummated it. It is shown that on payment by Rogers of $4,705.87 on September 29, 1885, the deed to Bacon, which had been transmitted to Mr. E. S. Chittenden from George N. Chittenden in 1882, was delivered to Rogers, and that at a subsequent time the deed running from George N. Chittenden to Rogers was secured (Record, 125, 126). The appellant claims that on the payment of the money mentioned and the delivery of the original deed to Rogers the original contract was carried out and executed, and that the title inured to Bacon and Rogers for the use of Hennessy.

Although the principles governing the present case are elementary, we cite the following authorities, which refer to many of the questions presented by the record:

Story's Equity Jurisprudence, sections 1258, 1261.
Taylor *vs.* Plumer, 3 M. & Selw., p. 574.
Oliver *vs.* Piatt, 3 Howard, p. 333.
Moore *vs.* Mandlebaum, 8 Mich., 441.
Huxley *vs.* Rice, 40 Mich., 73.
Case *vs.* Carroll, 35 N. Y., 385.

3.

As to the agreement of March 18, 1886, and the quitclaim deed given to Rogers by Hennessy in pursuance of the agreement referred to in our third assignment, we feel that there is need to say but little. The appellant claims that both agreement and deed were tainted with fraud and void, for two reasons: 1st. When the agreement and deed were made Rogers had nothing to convey save what he had procured by fraudulent collusion with Bacon and E. S. Chittenden and in violation of Hennessy's contract rights. Rogers was then intrenched behind the deed which George N. Chittenden had given him and which in equity ran to Hennessy and behind the assignments from Sanborn which Bacon had procured and the worthlessness of which Bacon knew on March 18, 1886, and concealed from Hennessy. 2d. The agreement and quitclaim deed under it were void because the material inducement of them was Rogers' repeated statement to Hennessy that he could hold the entire property under the Moore-Cressey mortgage. This statement was false and known to be so by Rogers. The defect in the title was trifling and easily curable, and the evidence that afterwards cured it was on March 18, 1886, in Rogers' possession, known by Bacon and E. S. Chittenen and concealed from Hennessy. There can be no doubt that when the agreement of March 18, 1886, was made Hennessy was ignorant of the cheat which had been practiced on him by Bacon and Rogers and of the collusion which existed between the latter. Mr. Rogers testifies that he said not a word to Hennessy at or prior to this agreement concerning Bacon's interest in the land and Bacon's collusion with him (Record, p. 60). Bacon testifies that during the entire series of transactions, and notably on March 17, 1886, when he assaulted Mr. Hennessy on a public street of St. Paul in answer to the latter's demand that the contract be fulfilled, his

only statement to Hennessy was that he wanted the remaining $400 to which he would be entitled under his contract with Hennessy (Record, pp. 69, 70). E. S. Chittenden nowhere testifies that Hennessy knew anything of Bacon's complicity with Rogers. It is claimed by Bacon and Rogers that Hennessy was aware of Bacon's alleged interest at the time when suit was commenced in the district court of Ramsey county to clear the defect under the Moore-Cressey mortgage (Record, p. 59). It appears from the undisputed evidence that this mortgage had been assigned to one A. M. Torbett, and that the mortgage had been satisfied in fact. This satisfaction, not being executed as a deed of real estate, was not entitled to record in this State, and consequently was not of record. As a consequence, Mr. Hennessy, who knew nothing of the assignment to Torbett, would receive no information by being informed that an action was about to be commenced against Torbett. The word "Torbett," even if mentioned, would convey no meaning to Hennessy. Mr. Hennessy explains that at the time of the supposed settlement Mr. Rogers informed him that there were some mortgages unsatisfied of record, causing defects in the record title which it would be necessary remove by action. The testimony shows that such was the fact. Mr. Hennessy says that he was shown the complaint in the Torbett case: that it was not read to him; that he did not know that Bacon was a party; that he did not know that the Moore-Cressey mortgage was involved; that he never saw the Moore-Cressey mortgage or knew of its assignment to Torbett until after the evidence commenced to be taken in this action. (Record, p. 107.)

The limitations of this brief have induced us in our reference to the printed record to call the attention of the Court almost exclusively to facts which are undisputed by the litigants. We are confident that a careful examination of all the evidence will demonstrate the merit of the allegations made by appellant in his answer to the amended complaint and his cross-bill.

4.

The contention of the plaintiffs in the circuit court was that Hennessy, immediately after the assignment of Bacon's contract to him, raised frivolous objections to the title, refused to take a warranty deed with the title uncleared, and so conducted himself as to waive his rights under his contract as against the plaintiffs. The record, however, shows that Mr. Hennessy was advised by his counsel to insist upon the clearing of the title; that there were two serious defects of record; that these defects were the only objections that Mr. Hennessy insisted on; that it was through the fraud of Bacon, E. S. Chittenden, and Rogers that Hennessy was not acquainted with the information that the record defects were in fact groundless. The admissions made by Bacon and Rogers in their testimony show conclusively the existence of this fraudulent conspiracy. There can be no waiver where there is active deceit and misrepresentation such as the record discloses in this case. It may be contended by the respondents that Hennessy is a speculator in the present matter, and that speculation is not favored in equity. The record shows that all the parties to the transaction are affected with the same charge—Bacon and Rogers as well as Hennessy. The former two parties, however, come into court demanding partition, not merely as speculators, but as sharpers and defrauders. They are not with the clean hands which a court of equity demands.

It is respectfully submitted, therefore, that the bill of complaint for partition should have been dismissed, and that the decree of the circuit court ordering partition and dismissing the cross-bill should be reversed.

M. F. Morris,
Dan. P. Lawler,
Of Counsel for Appellant.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

No. 1545.

DAVID J. HENNESSY, Appellant,

vs.

GEORGE V. BACON and EDWARD G. ROGERS,
Respondents.

RESPONDENTS' BRIEF

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA.

EDWARD G. ROGERS,
Att'y for Respondents,
St. Paul, Minn.

EVERSON HADLEY,
of Counsel.

BROWN, TREACY & CO., PRINTERS, 142 EAST THIRD,

Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

No. 1545.

DAVID J. HENNESSY,
Appellant,

vs.

GEORGE V. BACON AND EDWARD G. ROGERS,
Respondents.

STATEMENT OF CASE.

This was an action of partition commenced by the plaintiff Bacon in the District Court of Washington County, Minnesota, against the defendant Hennessy for a partition of the lands in dispute and particularly described in the plaintiff's complaint. Said Bacon and the said Hennessy, each owning at the time an undivided half of said land according to the records. Thereupon the defendant Hennessy removed the case to the United States Circuit Court of the District of Minnesota, on the ground that he was a native of Ireland and a citizen of Great Britain; the plaintiff Edward G. Rogers, having

previously sold a quarter interest in said land to his co-plaintiff George V. Bacon, for a consideration of ten thousand dollars, and the said Bacon having on account of the defense interposed by the defendant Hennessy, requested said Rogers to take back a quarter interest, the same was re-conveyed and Mr. Rogers was thereupon ordered by the said Circuit Court to be joined as a co-plaintiff with Bacon, each owning an undivided one-fourth interest in said land. The defendant Hennessy in his answer admits that the complainants each have the legal title to an undivided one-fourth of the property in question, but claims that he, Hennessy, is the equitable owner of all of said property, and he files a cross-bill to quiet title to the two undivided one-fourth parts claimed by plaintiffs, in which he claims that one George N. Chittenden was the owner of all the property in question March 27, 1882, and on that date entered into a contract to sell the same to the complainant, George V. Bacon, for forty-four hundred dollars. That Bacon by the terms of said contract was to pay the purchase price on or before the 27th day of June, 1882, upon the delivery of a warranty deed of the property, time being of the essence of the contract. That this contract was thereupon duly recorded in the office of the register of deeds, in the county where the land is situated; that on the 27th of June, 1882, said Bacon sold and assigned said contract and the interest which he had in said land thereunder to the defendant Hennessy, for the sum of five hundred dollars, whereupon Hennessy paid one hundred dollars down, and agreed to pay the other four hundred dollars to said Bacon, and the purchase price to said Chittenden upon the delivery of a warranty deed from either Bacon or Chittenden;

that said assignment was reduced to writing and duly recorded in the county where the land is situated. 7

The defendant in the cross-bill further alleges that he has tendered the amount due to Chittenden and has always been ready and willing to carry out the contract, but that both Bacon and Chittenden have refused, and still refuse, to carry out their part of the contract. He also claims that the complainants, Rogers and Bacon, conspired together to get this property away from him, Hennessy; that in September, 1885, they procured from said Chittenden a deed of the said property to Rogers under substantially the terms of the contract from Chittenden to Bacon; that Rogers in fact took the title to this property in his name in secret trust for Bacon and that Bacon agreed to give him for his services, a share in the profits of said property; that Rogers and Bacon made false representations to Hennessy as to the condition of the title to said property and as to Bacon's connection with Rogers in relation to said property, and thereby induced said Hennessy to give to Rogers a quit-claim deed to one undivided one-half of the property and to give a release of all claims which he, Hennessy, had against said Chittenden and said Bacon under the said contract from Chittenden to Bacon and the assignment thereof to him, Hennessy; and he asks to have the deed to Rogers vacated and set aside and that it be decreed that Rogers and Bacon hold the legal title in trust for Hennessy and that they be required to convey the same to him. 8 9

Rogers and Bacon filed an answer to the cross-bill and admit the contract from Chittenden to Bacon and the assignment from Bacon to Hennessy, and the recording of said instruments, and they allege that said Hennessy

10 for more than three years refused either to carry out said contract or take back his one hundred dollars and give up the contract, and they deny that they, or either of them, made any false representations to Hennessy to induce him to give the said quit-claim deed to Rogers; and they deny that said Rogers obtained the title to said property in secret trust for said Bacon. (See cross-bill and answer, pages 25 to 38, printed record.)

The case was submitted on the pleadings and proofs, and pursuant to the decision of Judge Brewer, a decree was entered dismissing the cross-bill and granting a
11 partition of the property. From this decree the plaintiff appeals.

The following facts are admitted by both parties, or are undisputed, and there is no controversy concerning them:

First—That George N. Chittenden was the owner of said property on March 27, 1882, and that there was certain apparent defects to his title on the record.

Second—On March 27, 1882, said Chittenden entered into a written contract to sell and convey said property to George V. Bacon for forty-four hundred dollars, the
12 said money to be paid on the delivery of a warranty deed on or before the 27th day of June, 1882, time being of the essence of the contract, and the contract to be void if Bacon failed to pay the consideration, which contract was shortly thereafter duly recorded. (See contract, page 36 of printed record.)

Third—On the 27th day of June, 1882, said Bacon sold and assigned the said contract and his interest in said land thereunder to Hennessy, Hennessy paying Bacon one hundred dollars in cash and agreeing to pay four hundred dollars more when a conveyance

should be made. This assignment was thereupon duly 13
recorded. (See assignment, page 37 of printed record.)

Fourth—That said Hennessy paid nothing to Chittenden, and only the aforesaid one hundred dollars to Bacon.

Fifth—That on or about the 29th day of September, 1885, said Chittenden sold and conveyed the said property to Edward G. Rogers, and said Rogers paid therefor about forty-seven hundred dollars, and gave said Chittenden a bond of indemnity against all claims of Bacon and Hennessy under the former contract. (See page 49 in printed record.) 14

Sixth—That on or about the 30th day of September, 1885, said Rogers purchased from John B. Sanborn certain outstanding claims against said property to perfect the record title in him, and paid one thousand dollars for the same. (See page 57 of the printed record.)

Seventh—That in December, 1885, said Rogers notified Hennessy that he had purchased said property and that he claimed the contract of sale to Bacon and the assignment thereof to Hennessy were a cloud upon his title, and that he was willing to pay Hennessy something for a quit-claim deed. (Page 53 of printed record.) That 15
negotiations were then carried on between said Rogers and Hennessy from December, 1885, up to the 18th of March, 1886, Rogers claiming in the meantime that he owned the property and that Hennessy's contract was a cloud on his title, and Hennessy claiming that he was the equitable owner of the property. (Page 168, printed record.) That on March 18th, 1886, Rogers and Hennessy came to an agreement, which was reduced to writing, whereby Rogers agreed to quit-claim to Hennessy an undivided one-half of the property, and Hen-

16 nessy agreed to pay to Rogers twenty-seven hundred and fifty dollars and quit-claim to him an undivided one-half of the property. And it was further provided in said contract that the said settlement should be in full of all claims in favor of said Hennessy and against said Bacon and Chittenden growing out of the former contract for the purchase and sale of said land by said Hennessy and Bacon and Chittenden. (See contract, page 122 printed record.)

Eighth—That thereupon, pursuant to said agreement, said Rogers gave a quit-claim deed of one undivided
17 half of said property to Hennessy, and Hennessy paid twenty-seven hundred and fifty dollars and gave a quit-claim deed to an undivided one-half of the property to Rogers.

Ninth—That the value of the said property increased largely between March, 1882, and March, 1886, and was worth at least thirty thousand dollars at said last named date.

The additional facts, which are established as the respondents claim by the evidence, are stated in the argument.

18 ## ARGUMENT.

I.

The first claim of the respondents is as follows:

That Mr. Hennessy has, by his delay and refusal to accept the deed of Mr. Chittenden, placed himself in such a position that a court of equity will not give him its assistance by decreeing specific performance.

The facts disclosed by the evidence and pleadings upon this point are briefly stated as follows:

That Mr. Hennessy having purchased the contract for the sale of this property on June 27th, 1882, on

which contract there had nothing whatever been paid 19
to the owner of the property, then paid Mr. Bacon one hundred dollars down and recorded this contract to prevent the sale of the property to any other person. That thereupon he made a tender of the contract price to Mr. Chittenden's agent in St. Paul and demanded a deed of the property, knowing all the time that the deed had not at that time been received by said agent from his principal. Shortly thereafter the deed arrived in St. Paul and Mr. Hennessy was notified and repeatedly urged to close up his purchase by Mr. Chittenden's agent. That he continually postponed the matter and delayed 20
accepting the property; afterwards he made numerous objections to the title to the property, some of which were apparently good as far as the record shows, and others were not. That for a period of more than three years the contract stood in this way; that Mr. Hennessy was repeatedly urged to take steps to close up said sale, or to take back his money and give up his contract, and that during all this time he refused to do either. Meantime the property was increasing rapidly in value and increased from forty-nine hundred dollars at the time Mr. Hennessy purchased the contract to at least thirty 21
thousand dollars in September, 1885, when the owner of the property sold to Mr. Rogers.

What is the evidence as to the facts as above stated?

There is no controversy as to the contract with Bacon and the assignment to Hennessy, or the contents of the same, or the dates when they were made, the amount paid, or that the deed was laying in St. Paul for all this time up to September, 1885; that Hennessy was notified of the fact, that he did not pay the money and take the deed; that he did not take his one hundred dollars and

22 give up his contract; that the value of the land increased as above stated.

But it is claimed that Mr. Hennessy "duly tendered and offered to pay to said George N. Chittenden the said sum of forty-four hundred dollars in pursuance and fulfillment of said contract so assigned." "And demanded a warranty deed conveying to him a good title to said land, which deed the said Chittenden was not at the time prepared to give and did not at the time have, or offer, but which he then and there promised to subsequently execute and deliver and which he failed and neglected
23 to do." (See cross-bill, page 27 printed record.)

Mr. Hennessy testifies that on the 27th day of June, 1882, *knowing that the deed had not reached St. Paul*, he went to E. S. Chittenden, the attorney of George N. Chittenden at St. Paul, and made a tender of the forty-four hundred dollars. (Page 116, printed record.) E. S. Chittenden testifies that at the time of said tender he told Mr. Hennessy that the deed had not arrived. (Page 125, printed record.) That the deed did arrive shortly after in the ordinary course. Mr. Chittenden further testifies, (pages 134 to 137, printed record), that
24 he saw Mr. Hennessy personally once or twice, and saw his attorney and saw Mr. Bacon repeatedly and requested them to close up the purchase of this land; that the deed was lying in his hands to be delivered three years; that during that time he was trying to get Bacon and Hennessy to close up the matter. That Hennessy made at least a dozen objections to the title and gave a list of them to him. That he tried for three years to get Bacon and Hennessy to pay the money and to take the deed; that Hennessy refused and Bacon said he could not get Hennessy to do it.

There are also in evidence three letters from Chitten- 25
den to Hennessy, dated respectively October 5th, 1882; November 6th, 1882; November 16th, 1882, each one urging Hennessy to do someting about the matter. These letters are found on pages 47 and 48 of the printed record, and are as follows:

October 5, '2, (meaning '82.)

D. J. HENNESSY, Esq., Dubuque, Iowa.

Dear Sir:—I have waited, (somewhat impatiently,) for your return to St. Paul for the purpose of getting to some understanding about the Chittenden purchase. Unless you are to return immediately please designate 26
some person or attorney whom I can see about it, and oblige, Yours respectfully,

E. S. CHITTENDEN.

The letter of November 6th, 1882, is as follows:

DEAR SIR: I hope you will lose no time in getting to some understanding about the Chittenden purchase. Unless some understanding is reached very soon I shall return the deed to Mr. C., and he will probably decline to carry out the sale. Yours respectfully,

E. S. CHITTENDEN.

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The letter of November 16th, 1882, is as follows:

D. J. HENNESSY, Esq.,

St. Paul, Minn.

DEAR SIR: Yours of the 15th, inst., received in answer to a previous letter. You instructed me to see Mr. Horn. I immediately saw him and satisfied him as to some of the objections, consulted him as to others and left the papers with him. He expressed the wish to see you about the matter, in order that he might inform you directly and positively what further would be

28 required to make the title good. I have sought in every way since you went into this transaction to obtain an interview with you, or someone authorized to act for you, in order to arrive at something definite, and have found it exceedingly difficult to do so. Although instructed to refer me to Mr. Horn, Mr. Kavanagh did not do so until I wrote you, and now that I have interviewed Mr. Horn I find it difficult to reach any result. I am not accustomed to that way of doing business and cannot say that I particularly appreciate it. I would suggest that the best and quickest way to come to some
29 definite understanding about the matter is for you to meet Mr. Horn and myself at such early time as may be designated by you. Unless this is done by Monday, next, (Nov. 20), I shall return the deed (which I hold ready for delivery to you) to Mr. Chittenden, and it is doubtful whether he will carry out the same. Allow me to suggest it is a part of your manifest duty not to interpose innumerable delays to the settlement of this matter, and that if you will appoint the above meeting or designate Mr. Horn or some other person who can act for you in your absence, this transaction can speedily be
30 finished. Respectfully yours,

E. S. CHITTENDEN.

Mr. Bacon's testimony upon this point is as follows: (Page 68 and 69 of printed record.)

After Mr. Hennessy had taken this assignment of the contract I had with Mr. Chittenden, I was interested to the extent of $500, $100 of which I had received, and I was very anxious to get the money and have the matter closed, and after a reasonable length of time had elapsed from the time Hennessy had received the abstract, I

went to see him and asked him when he was going to 31
close the matter up, that I understood the deed was here. Mr. E. S. Chittenden had told me he had received the deed and was ready to close it up. I could get very little satisfaction out of Mr. Hennessy, (I think he has naturally a way of not saying much to satisfy one.) He said he had some objections to the title that must be fixed up. I asked him to signify to me or to Mr. Chittenden, (E. S.) what he objected to and have it fixed up in shape. Some time after I learned from Mr. Chittenden that he hadn't received any objections to the title and was rather anxious to have the matter closed. I went 32
to see Mr. Hennessy again, and I went up to the hotel. He said he was engaged, but I went up and knocked at his door and went in and told him I wanted that matter fixed, and I understood he hadn't taken any steps to close it, and I thought he ought to. He said it was their business to fix up the title. I said, "You haven't stated what the objections are." He said, "They can find out; they know as well as I do."

Q. Do you know how many objections there were?

A. He wouldn't make any specifically; he said that they knew and he knew. I told him that wasn't the 33
customary way to do, if he had any specific objections he ought to state them to Mr. E. S. Chittenden, and he had not done so. Mr. Chittenden didn't know what the objections were, nor I didn't know. He let the matter stay that way a long time; it was impossible to get any satisfaction out of Mr. Hennessy.

Q. When were these conversations you speak of? Give the length of time through which they ran.

A. The coversations I had with him must have been running—well, I may say from the delivery of this contract, 1882, was it?

Q. Yes, the spring of 1882.

A. Well, I had repeated interviews with him, as I say, after he had the abstract a reasonable time, and I thought he ought to have the thing closed, and up to the time when I told him the deed from Geo. N. Chittenden was ready for him. For two or three years those interviews were, I think.

Q. After you told him the deed had arrived could you get Mr. Hennessy to come and perfect his contract?

A. No; I could not get Mr. Hennessy to do anything. I begged him to come and have a talk with Mr. Chittenden.

Q. You knew he made a tender before the deed did come?

A. He made a tender before it came. He asked specifically if the deed was there, and I told him it was not; that the deed was not there.

Q. After finding the deed was not there he went up and made a tender?

A. Yes.

Q. After the deed arrived could you get him to go up and make a tender?

A. I couldn't get him to do a thing.

Q. How long were you trying to get him to close the matter up and take his deed?

A. For a number of years; it was probably from two to three years.

Q. Wasn't it from the spring or summer of 1882, till the fall of 1885?

A. Yes; fully that time.

Q. How do you recollect the conversation he says he had with you out here in front of the German-American Bank?

A. Yes; I don't know of much conversation with him. I will say here that that came up in this way: I had been to see Hennessy repeatedly and one of the last times I told him just this: "Mr. Hennessy, I have been for several years trying to get you to close this deal on that land. I have told you that if you didn't do it I would bring a lawsuit. You don't care anything about a lawsuit. You would just as lief have a lawsuit as not. I have asked you as a gentleman, either to take the deed or throw up the contract and you won't do either; you won't do anything. Now, if you won't do anything I will give you a thrashing." 37 38

Mr. Bacon, on page 75 of printed record, testifies that he repeatedly offered Mr. Hennessy back his $100 and asked him to give up his contract and he refused.

Mr. Hennessy's testimony on cross-examination does not differ very materially from that of Bacon and Chittenden. On page 116 of the printed record his testimony is as follows:

Q. Mr. Bacon testifies that he attempted for several years to get you to fix this matter up; is that true?

A. It is not true in that form.

Q. Wasn't he running after you for the first two years or so trying to get you to settle the matter up? 39

A. He was running after me trying to get me to see Mr. Chittenden sometimes, but generally to try and get me to surrender my interests.

Q. Now, Mr. Hennessy, hold on. The first year after you made this contract with Bacon wasn't he trying to get you to close the matter up, and nothing said about releasing your contract and surrendering your interests?

A. My recollection is not.

40 Q. The first year?

A. The first year.

Q. You think immediately after making the contract with you he commenced to try to get you to give it up?

A. I don't state anything of that kind—that he did immediately after. Between the words "immediately" and the "first year" there is a big difference.

Q. Why didn't you go and tender to Chittenden that money after you heard the deed had come?

A. Because at the time I heard the deed had come I was aware of the condition, very likely, of the title, and
41 it was their duty to fix that title.

Q. What made you go and tender the money to Chittenden when you did?

A. I went to tender the money to Chittenden when I did for the reason that on that day Bacon's contract would expire, and it became obligatory for Bacon to make the tender, and he tried to get me to give him money to make the tender in his own behalf before, which I declined to do."

The testimony of these three persons who are the
42 principal persons engaged in the controversy, shows very clearly the attitude Mr. Hennessy has taken in regard to the contract. He had a contract for the property; that contract was recorded; he supposed no one else would buy the property with that contract on record. He had only one hundred dollars invested in the land that he had contracted to pay five thousand dollars for, and that was increasing in value; he had nothing to lose and everything to gain. If the value of the land went down he could throw up his contract and rely upon a defect in the title to avoid the same; if the value went

up he would hold on to the contract and take the title at 43
his pleasure.

Mr. Justice Brewer, in his opinion on this case, 35 Fed. Rep., page 175, states very clearly the position in which Mr. Hennessy stands, in the following language:

"To my mind the first question is not what was the conduct of Bacon and Rogers? But what standing has the defendant Hennessy in a court of equity? He gets a contract for land in 1882 for which he pays $100, and puts that contract upon record. That is all the investment he makes, but when the deed is tendered him, although a warranty deed is presented, he insists that all 44
defects shall be removed. It stands that way for three years with that clasp upon the title preventing the original owner from making any other disposition of it. He refuses to take back his $100, but insists upon keeping his hold upon the land waiting for his chances of its rise or fall in value. After waiting three years, the original owner getting no money and wanting to realize something out of this land, sells it elsewhere, and then the second purchaser having obtained all the title that the original owner had, except that which was owned by Hennessy by virtue of his contract and having cleared off all other apparent defects negotiates with Mr. Hennessy, the negotiations running over four or five months, when they compromise and settle. A man who puts a contract upon record on which he has paid a mere bagatelle and thus gets the chances of the rise or fall in value, and at the end of three years when the property has risen in value at least seven fold, comes to enforce specific performance of the original contract, occupies an attitude which does not commend itself to the conscience of a court of equity. Whatever legal rights

there may be the conduct of a man who takes a contract on property and ties it up so that the owner cannot sell it, and proposes to hold it so that if it becomes valuable he can insist upon his rights and can drop it if the property should happen to depreciate in value, does not commend itself to a court of equity."

The general rule of law is that the party to a contract who asks for specific performance must show himself to have been "ready, desirous, prompt and eager" to carry out his contract. The right to specific performance is not an absolute right, but is discretionary with a court of equity.

"Where a vendee delays in completing the contract in order that he may speculate upon the chances of its proving to be an advantageous bargain, or that through a rise in value or other change of circumstances his gain may be assured, and then when he is thus certain that it will be a fortunate speculation offers to perform and sues to compel a conveyance by the vendor, a court of equity will refuse to grant him the remedy, even although he may have at an earlier date paid part of the purchase price."

Pomeroy on Contracts, Sec. 407.
Brashier vs. Gratz, 6 Wheat., 529.
Rogers vs. Saunders, 16 Me., 92.
Firth vs. Greenwood, 1 Jur. N. S., 866.
Alley vs. Deschamps, 13 Ves. Jun., 225.
Merritt vs. Brown, 4 C. E. Green, 286.
Kirby vs. Harrison, 2 Ohio St., 32.
Roby vs. Cossitt, 78 Ills., 638.
Cooper vs. Brown, 2 McLean, 495.

This rule is especially true where there has been a great change in the value of property between time of making contract and when it is sought to be enforced. 49

Brashier vs. Gratz, supra.
Merritt vs. Brown, supra.
Roby vs. Cossitt, supra.

The respondents further claim that Hennessy having repeatedly refused to accept the deed from Chittenden, he thereupon waived his right to have the contract carried out and Mr. Chittenden was at liberty to declare the contract at an end. This he did when he sold the land to Rogers. 50

Cummings vs. Rogers, 36 Minn., 317.
McIndoe vs. Morman, 26 Wis., 588.

It is admitted that there were certain defects in the record title of Chittenden. It does not appear whether or not these were real defects. Mr. Hennessy could not be compelled to take the title, but that does give him the right to hold on to his contract and wait to see what might turn up; he could not hold Chittenden and Bacon and not be bound himself.

This doctrine is clearly laid down by Chief Justice Marshall in the case *Brashier vs. Gratz*, supra, in the following language: 51

"No court could allow one party to hold the other bound while the obligation was not reciprocal, or to hold himself prepared to avail himself of all the favorable contingencies whithout being affected by those which were unfavorable."

See also

Rogers vs. Saunders, 12 Me., 92.
Waterman on Spec. Perf., Sec. 419.

52 II.

The second position of the respondents is that, even if Mr. Hennessy had retained all his rights under the contract of Chittenden to Bacon and the assignment to him and had been entitled to specific performance of the same, yet on the 18th day of March, 1886, he entered into a valid contract with Rogers, whereby he compromised and released all rights which he had under said contract and the assignment.

There is no question but that such a contract was made and that if valid then the cross-bill was properly
53 dismissed.

The contention of the appellants is that this contract is void, on the ground that Mr. Hennessy was induced to make the same by certain fraudulent representations.

The first claim of the appellant is that Rogers and Bacon represented to Hennessy that Rogers owned the property, and that Bacon had no interest in it, whereas, as a matter of fact, Rogers had no interest in the property, and held the title in secret trust for Bacon. (Page 28, printed record.)

Even if this had been supported by the evidence, we
54 fail to see how Mr. Hennessy was injured. Mr. Rogers purchased the property from Chittenden with notice of all of Mr. Hennessy's rights under the contract; the contract and assignment were recorded, and the record was constructive notice, and he admits also that he had actual notice. If Mr. Hennessy had any rights against Mr. Bacon he could enforce them equally well against Mr. Rogers.

But there is no evidence whatever of the facts claimed by the appellant. On the other hand the only evidence on the point shows that Rogers purchased the property

with his own money, that he also bought in the out- 55
standing titles held by Sanborn for $1,000, and paid his own money. (Pages 57 and 58, printed record.)

Rogers did promise to give Bacon one-half the property if Bacon would assist him in getting the land from Chittenden and pay one-half the expense of clearing the title, but this did not include one-half the purchase price. (Page 66, printed record.) But there is no evidence that Bacon had any right of title to the land when Hennessy compromised with Rogers.

There is a conflict of testimony as to whether any representations were made regarding Bacon having an 56
interest in the land.

Mr. Hennessy testifies on page 157, that Mr. Rogers told him he had no connection with Bacon. Mr. Rogers on the other hand testifies that he told Hennessy that he owned the land and said nothing about Bacon. (Page 56, printed record.)

The whole evidence shows that Hennessy knew that Rogers had procured the land through Bacon.

On March 17th, 1886, Hennessy testifies he had a talk with Rogers and Bacon together and demanded that Bacon carry out his contract. When the settlement was 57
made the next day, March 18th, 1886, a part of the agreement was that Hennessy should release *Bacon*. (Printed record, page 122.) And during the negotiations Mr. Hennessy admits he made his propositions to Rogers on the basis that Mr. Rogers was to take Hennessy's claim against Bacon for $100, which he had advanced as earnest money on the contract. (Printed record, page 106.)

Mr. Rogers testifies that the final settlement with Hennessy was made on the basis of deducting $100

58 from the real amount to be paid by Hennessy on account of the $100 paid Bacon. (Pages 56 and 58, printed record.) This is substantiated by Mr. Hadley's testimony, page 46, printed record.

The next claim of Mr. Hennessy is that Mr. Rogers represented to him that there was no evidence that a certain mortgage, known as the Moore-Cressy mortgage, was paid, while as a matter of fact, he knew and had evidence that the same had been paid.

Mr. Rogers denies that he ever claimed that the mortgage was valid, (page 56 of the printed record,) and
59 states that Hennessy knew it was paid and a part of the settlement with Hennessy was that he, Rogers, was to bring an action to have the mortgage declared satisfied without expense to Hennessy, (page 58, printed record;) that after Mr. Rogers returned from California he did bring such an action and took the complaint to Mr. Hennessy and showed it to him. (Page 59, printed record.)

Mr. Hennessy admits, on cross-examination, that at the time of his settlement with Rogers, Rogers agreed to bring an action, at his own expense, to clear the title
60 of the Sanborn, i. e. Moore-Cressy mortgage. (Page 174, printed record.)

Furthermore, Mr. Hennessy testifies that he has for a long time been familiar with drawing real estate papers, that he examined the abstract in this case and noted objections for his attorney to pass upon; that he had employed an attorney to look up this title.

More than three years had elapsed between the time when he first got the abstract and the time when he made the settlement with Rogers, and he had been carrying on negotiations with Rogers at least three

months, and had every facility that Mr. Rogers had to 61
find out about the title to this property, and, as the evidence shows, was, as a matter of fact, as familiar with the title as any person connected with the transaction.

The correspondence between Hennessy and Rogers, (pages 53 and 54, printed record,) shows the attitude of the two parties in regard to the compromise and whether Mr. Hennessy was being fraudulently induced to believe that his title was not good. In his letter of January 21, 1886, Hennessy says: "While I am fully assured of the validity of my right and title in and to the lands referred to and prepared to defend that right and title to 62
the utmost, if need be, I am nevertheless in the interests of peace and for the sake of avoiding what may prove a long, vexatious and expensive litigation, to say nothing of the bitterness of feeling usually resulting from such things, am willing to meet you and see if some amicable adjustment of the question that has arisen cannot be reached."

This negotiation between Rogers and Hennessy continued down to March 17, 1886, both Rogers and Hennessy claiming all the time that they each had a good title to the land and that the claim of the other was a 63
cloud on his title, and then, on the 17th day of March, they agree to a compromise, and each is to have an undivided half of the land, and Hennessy is to pay Rogers one-half of what he has expended and Rogers is to allow Hennessy the $100 he paid Bacon. (Page 56, printed record.) By this compromise, according to Mr. Hennessy's testimony, he got a clear title to land worth $15,000 for $2,850, and now he claims that he would not have made this settlement if he had known that Bacon assisted Rogers, or if he had known as much about the title as Rogers did.

64 A short extract from the cross-examination of Mr. Hennessy shows clearly the attitude of Mr. Hennessy. (Page 165, printed record.)

Q. "The records, so far as this piece of land was concerned, were just as much open to you as to Mr. Rogers?

A. Yes, sir.

Q. You had the same facilities for looking up this piece of land that he had?

A. I don't think I had, sir.

Q. Wherein did he have any more facilities than
65 you?

A. I don't know. I suppose he had scores of information that I had not.

Q. I don't want what you suppose. I ask you if you know. You say you think he had a better chance to look up the title than you. What is your basis for thinking so?

A. It is his business. He understands it. He is an attorney, and I am not.

Q. Can you hire a lawyer?

A. I can.

66 Q. Didn't you hire Mr. Horn?

A. I did.

Q. Then how had he any chance over you? You had hired an attorney to act for you.

A. Mr. Horn acted for me in examination of the title, that was all.

Q. Was there anything to hinder your employing him to look it up just as thoroughly as Mr. Rogers looked it up?

A. Nothing, except expense. I didn't want to go to the expense.

Q. You knew Mr. Sanborn lived right here in the city? 67

A. I did.

Q. And you never went to them to take pains to ask them about their claim to that land?

A. I did not go and ask Mr. Sanborn about it.

Q. When did you first hear of their interest or claim in the land?

A. The summer of 1882.

Q. And then this matter lay along all that time—three years—and you were living right here in the city, were you not? 68

A. No, sir.

Q. Where did you live?

A. I was here a portion of the time and away a portion of the time.

Q. Where did you live?

A. My home was in Dubuque, Ia.

Q. How much of those three years did you stay in St. Paul?

A. About half the time.

Q. During those three years you were half the time right here in St. Paul, and made no effort to learn from 69 Mr. Sanborn what that interest was in the land?

A. I did not. I understood, however, that they claimed that mortgage.

(Page 168, folio 291.)

Q. You understood that Mr. Rogers claimed the title to that land from December, 1885?

A. Yes; from about December, 1885.

Q. And from December, 1885, up to March, 1886, you had been examining the claim?

A. Yes; I did.

70 Q. Did you make any efforts at all, or employ any attorney or anything to look up this right to that land?

A. I did not.

Q. You wouldn't have made that settlement had you understood it?

A. I would not.

Q. Put your finger on one fact that Mr. Chittenden testified to, that if you had known you would not have made that settlement?

A. There was quite a number of facts. Mr. Bacon's connection with the transfer to Rogers was one.

71 Q. The question I ask you now is, if you had known that Mr. Bacon had anything to do with the helping Rogers get this title you would not have made this settlement with Mr. Rogers?

A. It is a fact.

(Page 169, folio 292.)

Q. You stated to Mr. Rogers that he hadn't any title to the land, didn't you?

A. I understood from Mr. Rogers that he had a title separate from that through Chittenden deed. I didn't know what title he had, or believe in his title under

72 these claims.

Q. You stated to Mr. Rogers that he had no title to these lands, didn't you—that it was a cloud upon your title?

A. The Chittenden deed?

Q. Yes.

A. Yes, sir.

Q. And you insisted he hadn't any title to that land; that the title belonged to you?

A. I said that the equitable title belonged to me.

Q. He said that he had a title to the land, and that your contract was a cloud upon it? 73

A. Yes, sir."

The whole animus of this suit by Hennessy is just this: Mr. Bacon and Mr. Hennessy had a personal altercation when violent words passed between them, and Mr. Bacon struck Mr. Hennessy, (page 166, printed record) and consequently Mr. Hennessy feels bitterly towards Bacon, and when he found that Bacon had acquired this land from Rogers he brought this cross bill merely as an annoyance to Bacon.

The whole evidence shows that Hennessy made a fair compromise of this claim upon the property, that he had really no valid claim to the property and nevertheless has obtained a half interest for a small part of its actual value. That settlement should stand and the cross-bill was properly dismissed. 74

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